

2003

Green River Canal Company v. Jerry D. Olds : Brief of Appellee

Utah Supreme Court

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Recommended Citation

Brief of Appellee, *Green River Canal Company v. Olds*, No. 20030156.00 (Utah Supreme Court, 2003).
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In the Utah Supreme Court

Supreme Court Case No. 20030156-SC

IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO USE OF WATER, BOTH
SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE ARE OF THE PRICE RIVER AND
OF THE DRAINAGE AREA OF THE GREEN RIVER FROM THE CONFLUENCE OF THE PRICE
AND GREEN RIVERS TO THE CONFLUENCE OF THE GREEN AND COLORADO RIVERS
EXCLUDING THE DRAINAGE ARE OF THE SAN RAFAEL RIVER IN UTAH
(Area 91, Book 5)

GREEN RIVER CANAL COMPANY,
Objector/Appellee,

v.

JERRY D. OLDS,
Utah State Engineer/Appellant.

BRIEF OF APPELLEE

On Interlocutory Appeal from a Judgment of the Seventh Judicial District Court for
Emery County
Honorable Bruce K. Halliday

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this interlocutory appeal under Utah Code Ann. § 78-2-2(3)(J) (2002).

STATEMENT OF ISSUES/STANDARD OF REVIEW

The following issues are present in this appeal:

1. Whether the trial court correctly interpreted § 73-4-11 of the Utah Code. “A trial court's determination of the law is reviewed under a correctness standard; [the reviewing court] afford[s] no degree of deference to a trial judge's determination of the law.” *United States Fuel Co. v. Huntington-Cleveland Irr. Co.*, 2003 UT 49, ¶ 9, 79 P.3d 945; *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998).

2. Whether the trial court developed an appropriate equitable remedy in its decision regarding the State Engineer’s motion to dismiss. On appeal, “‘a trial court is accorded considerable latitude and discretion in applying and formulating an equitable remedy,’ and will not be overturned unless it abused its discretion.” *Id.* (quoting *Thurston v. Box Elder County*, 892 P.2d 1034, 1041 (Utah Ct.App.1995) (citing *LHIW, Inc. v. DeLorean*, 753 P.2d 961, 963 (Utah 1988); *Morris v. Sykes*, 624 P.2d 681, 684 (Utah 1981))).

3. Whether the district court properly allowed the Green River Canal Company (“Canal Company”) to amend its objection to the State Engineer’s proposed determination in the general adjudication pursuant to § 73-4-10 of the Utah Code. According to this court, “[t]he granting or denial of leave to amend a pleading is within the broad discretion of the trial court, and [this court] will not disturb such a ruling absent a showing of an abuse of that

discretion.” *Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, ¶ 31, 84 P.3d 1154; accord *R & R Energies v. Mother Earth Indus.*, 936 P.2d 1068, 1080 (Utah 1997).

DETERMINATIVE STATUTES

The plain language of three Utah statutes is determinative. Section 73-4-3 of the Utah Code states in part as follows:

as soon as [the survey of the water source] has been completed, the state engineer shall file notice of completion with the clerk and give notice by registered mail or by personal service to all claimants whose names appear on the list that the survey has been completed and that their claims are due within 90 days from the date of notice.

Utah Code Ann. § 73-4-3 (1989) (attached as Addendum A). Section 73-4-10 of the Utah Code states as follows:

The court shall have power to allow amendments to any petition, statement or pleading; to extend as provided in this title the time for filing any statement of pleading, statement, report or protest.

Id. at § 73-4-10 (attached as Addendum B). Section 73-4-11 of the Utah Code states in part as follows:

After full consideration of the statements of claims, and of the surveys, records, and files, and after a personal examination of the river system or water source involved, if such examination is deemed necessary, the state engineer shall formulate a report and a proposed determination of all rights to the use of the water of such river system or water source, and a copy of the same shall be mailed by regular mail to each claimant with notice that any claimant dissatisfied therewith may within ninety days from such date of mailing file with the clerk of the district court a written objection thereto duly verified on oath.

Id. at § 73-4-11 (attached as Addendum C).

STATEMENT OF THE CASE

This matter arises out of the general adjudication initiated on March 15, 1956, to determine the various rights to the use of water in the Lower Green River and the Price River Drainage areas. (R. 1:i, R. 161.) On May 1, 1972, the State Engineer completed a Proposed Determination of Water Rights in the Price River and Lower Green River Drainage (Area Code Nos. 91 and 92) (“Proposed Determination”) containing his recommendations regarding all the claims to water, including the Canal Company, in the named drainage areas. (R. 1:iii.) Shortly after receiving the Proposed Determination, the Canal Company submitted an objection to the State Engineer’s recommendation concerning the Canal Company’s Water User’s Claim. (R. 37.) The Canal Company filed amendments to its initial objection in 1993 and 1999. (R. 6, 39, 42.) This interlocutory appeal arises out of the district court’s denial of the State Engineer’s motion to dismiss the Canal Company’s objection.

¹In a recent decision, *Green River Canal Company v. Thayn*, 2003 UT 50, 84 P.3d 1134 (hereinafter *Green River*), this Court reviewed a district court’s decision regarding a contract matter between the Canal Company and Lee Thayn. Although the issues and adverse parties were distinct from this case, this Court commented on facts at issue in this case. In *Green River*, this Court noted that the Canal Company “has never filed an objection to the proposed determination,” that the Canal Company “has long acquiesced in the State Engineer’s proposed determination,” and that the Canal Company “has recently asked the State Engineer to modify the proposed determination, [but] . . . was denied.” *Id.* at ¶ 31. These statements reflect on the central issues of this appeal but conflict directly with the undisputed facts and the district court’s February 7, 2003 Memorandum Decision holding the Canal Company’s objections timely, from which this appeal was taken. However, these statements in *Green River* should not be considered to have resolved the questions presented in this case because they were never a part of that litigation. Instead, these statements illustrate this Court’s recognition that “the prosecution of an independent action” outside of the general adjudication can result in judgments inconsistent with decisions in the general adjudication. *United States Fuel Co. v. Huntington-Cleveland Irr. Co.*, 2003 UT 49, ¶ 12, 79 P.3d 945.

THE CANAL COMPANY'S WATER USER CLAIM AND OBJECTION

In 1880, the settlers of Green River City began constructing diversion facilities on the Green River. The Canal Company was formally incorporated in 1904 to serve those same farms and numerous residents within Green River City. (R. 60.) The Canal Company filed a Statement of Water Users Claim to Diligence Rights on June 18, 1952, stating it was diverting 20 cubic feet per second (cfs) of water on a year-round basis for stockwatering (directly out of the canal and by a few outlets that could access water at that level), plus an additional 60 cfs during the irrigation season for a total diversion of 80 cfs, thereby memorializing the diversion and use of water it had historically made since 1880. *See Statement of Water User's Claim to Diligence Rights*, 1 (attached as Addendum D). Until 1997, the Water Code specified that diligence claims such as the one filed by the Canal Company constituted “prima facie evidence of claimed right or rights therein described.” Utah Code Ann. § 73-5-13 (1989) (attached as Addendum E). Their pre-1903 use under this diligence claim legally entitled the Canal Company to 80 cfs during the irrigation season.²

The terrain crossed by the Canal Company's canal is virtually flat, which reduces the flow rate, allows silt in the water to settle out, and is the cause of the Canal Company's need for 80 cfs. (R. 61.) The Green River is extremely silt laden, and silt continuously builds up on the bottom of the canal. (R. 156.) The Canal Company has maintained and operated the canal for over 100 years by constant “sluicing,” i.e., regularly opening sluice gates along the

²The phrase “diligence claim” comes from the fact that, prior to 1903, there was no application process in Utah, and water rights were acquired by diversion and beneficial use.

canal to flush out the silt buildup one section at a time. (R. 61.) Before the district court, the Canal Company presented an undisputed affidavit by Jack A. Barnett, P. E., indicating that the canal must be flowing at full capacity, i.e. 80 cfs, in order to function properly. *See Barnett Affidavit*, ¶ 4 (R. 156; attached as Addendum F.) The Barnett Affidavit specifies that without sluicing, the silt settles in the canal and slows down the flow of water. *See id.* at ¶ 5. (R. 156.) All non-consumed water flows back into the Green River.³ (R. 60.)

In its Statement of Water User's Claim, submitted in the general adjudication on November 6, 1969, the Canal Company indicated that it had a right to the beneficial use of surface water of the Green River. (R. 81, attached as Addendum G.) The Canal Company's statement described the nature of the water right as 60 cfs (cubic feet per second) used for irrigation purposes from March 15 to November 1 and 20 cfs used for stockwatering purposes from January 1 to December 31. (*Id.*) Additionally, the Canal Company's Water User's Claim indicated that these amounts included water used for domestic purposes from January 1 to December 31. (*Id.*)

After receiving and compiling water user claims from claimants along the Price and Green rivers, the State Engineer produced his Proposed Determination on May 1, 1972, and began distributing it. (R. 1:iii.) The Proposed Determination noted in its introduction that "the diversion requirements have been considered to be 4.00 acre feet per acre per calendar

³This Court has twice held that using water to transport other water for irrigation purposes is a beneficial use so long as the carrier water is returned to the natural stream. *See East Bench Irr. Co. v. Deseret Irr. Co.*, 2 Utah 2d 170, 271 P.2d 449, 455 (1954); *Jackson v. Spanish Fork West Field Irr. Co.*, 119 Utah 32, 35, 235 P.2d 918, 919 (1951).

year, regardless of the source of supply.” (R. 1:ii.) In Book 5 of the proposed determination, the State Engineer wrote that the Canal Company could use 60 cfs of water for irrigation purposes from April 1 to October 31 and that it could use 20 cfs of water for stockwatering and domestic use from November 1 to March 31. (R.1:1143) He also noted in a footnote that “From April 1 to October 31, inclusive, flow for stockwatering and domestic is part of flow for irrigation.” (*Id.*) This footnote is the first and only indication that despite its 1952 diligence claim and its 1969 Water User’s Claim, the State Engineer believed the Canal Company was only entitled to divert a total of 60 cfs during the irrigation season.

According to the State Engineer, Delbert Tidwell, secretary of the Canal Company, picked up a copy of Book 5 and signed a document entitled “Notice Receipt and Waiver” on December 15, 1972. (R. 37) Whether or not Mr. Tidwell actually did so cannot be ascertained as Mr. Tidwell is deceased and unavailable to testify. (R.145.) On June 8, 1973, John Vetere, president of the Canal Company signed an objection that was stamped filed with the Seventh District Court on June 20, 1973. (R. 3.) The Canal Company protested the period of irrigation use recommended by the State Engineer. (*Id.*) Instead of irrigation being permitted from April 1 to October 31, the Canal Company requested the period “be at least March 15 to November 15.” (*Id.*) The State Engineer did not contest this objection until October 31, 2000, when it moved to dismiss the objection as untimely. (R. 31.) According to the State Engineer’s calculation, this objection was 97 days late. *See Appellant Brief*, 9.

On June 18, 1993, the Canal Company submitted two subsequent amendments to its initial objection. (R. 39, 42.) In one of these amendments, the Canal Company requested

that “Green River City’s claim and water right under 91-39 . . . be declared invalid because Green River City has failed to apply the water to beneficial use.” (R. 40.) In the other amendment, the Canal Company requested that “[d]iversion duty for irrigation water rights in the Green River area, including Green River Canal Company’s water right under 91-294, . . . be set at 6.00 acre feet per acre per calendar year.” (R. 43.) The State Engineer did not respond to these amendments until October 31, 2000.⁴ (R. 31.)

The Canal Company filed the last supplement to its initial objection on October 14, 1999. (R. 6.) This supplement sought the removal of the language in the State Engineer’s footnote concerning the Canal Company’s water user claim in the Proposed Determination that “[f]rom April 1 to October 31, inclusive, flow for stockwatering and domestic is part of flow for irrigation.” (R. 1:1143.) By including stockwatering and domestic water with irrigation water, the State Engineer “effectively reduce[d] the Canal Company’s diversion rights during the irrigation season from 80 cfs to 60 cfs total . . . render[ing] the canal system incapable of delivering irrigation water to all of its shareholders which it has historically been able to do.” (R. 8.) As with Canal Company’s previous submissions, the State Engineer did not respond at all until October 31, 2000. (R. 31.)

⁴The State Engineer has recently increased the irrigation duty from four acre feet to six acre feet, validating the Canal Company’s position. *See Appellant Brief*, 10 n.1. *See also First Addendum to the Proposed Determination of Water Rights Price River and Lower Green River Drainage*, dated April 4, 2003 (“In response to certain objections to the Proposed Determination regarding duty, the State Engineer has re-evaluated the duty in Area 91.”) (attached as Addendum H). Though not part of the record, this Court may take judicial notice of this document. *See infra* n.2. Such action is consistent with his historic practice of considering meritorious objections filed outside the initial ninety-day objection period. (R. 149)

PROCEDURAL BACKGROUND

On October 31, 2000, the State Engineer filed a motion to dismiss the Canal Company's objection to the proposed determination and its subsequent amendments, on the sole ground that the objection was filed outside the ninety-day objection period established in § 73-4-11 of the Utah Code. (R. 31-32.) Responding to this motion, the Canal Company asked the district court to exercise its authority under § 73-4-10 of the Utah Code to extend the time for the Canal Company to file its objection and allow it to be heard on the merits. The Canal Company argued that the State Engineer's extraordinary twenty-seven year delay in bringing the motion to dismiss justified the application of the equitable doctrines of laches or waiver, and that the State Engineer's actions violated the due process clause of the United States Constitution and the uniform operations of law clause of the Utah Constitution. (R. 64-72.) In addition to responding to the State Engineer's motion, the Canal Company submitted an alternative motion to dismiss the entire general adjudication for failure to prosecute or to extend the time for filing objections. (R. 58, 74.) Following oral arguments and extensive briefing by both parties, the district court denied both parties' motions on February 7, 2003 "except to the extent that this Court's interpretation of the statutory scheme allows additional time to file the objection herein." (R. 443-44.)

In its memorandum decision, the district court compared the language of §§ 73-4-3 and 73-4-11 of the Utah Code. (R. 439-440.) Section 73-4-3 requires the State Engineer to give notice of the completion of the State Engineer's water survey "by registered mail or by personal service" to all claimants involved in the general adjudication. Utah Code Ann. §

73-4-3 (1989). On the other hand, § 73-4-11 requires the State Engineer “mail[] by regular mail” notice and a copy of the proposed determination to all claimants. *Id.* at § 73-4-11. Looking to the plain language of these sections, the district court determined that “the Legislative Scheme was and is purposeful – and the Legislature had a reason(s) for drafting the disparate language in” §§ 73-4-3 and 73-4-11. (R. 442) Thus, the district court held that § 73-4-11 required the State Engineer to mail the proposed determination and that the 90-day period should not run “until all claimants receive the necessary notice” by mail (R. 440.)

Based on this determination, the district court, invoking equitable powers, attempted to “construe the statutes to do the least harm possible and by so doing . . . serve the equitable position that all parties deserve their legitimate day in Court.” (R. 442.) Thus, the district court held as follows:

If all objectors/claimants are to be treated fairly, then all claimants should have 90 days to present their objections under 73-4-11, and I believe that period should be computed using the date of the last event, either mailing certificate or waiver which is on file herein which affects each area. With regard to area #91, I conclude that to be June 4, 1974, which is the date of the last dated Waiver by Joseph Novak.

(R. 442-443 (emphasis in original).) Applying this standard to the facts of the case, the district court further stated:

I believe equitably speaking, the delay in raising the defense which the State Engineer’s Office now attempts to raise by its’ [sic] Motion to Dismiss gives me equitable grounds for allowing the proceedings to go forward and to treat the Green River Canal’s objection as being timely filed and further treating the “supplemental filings” by that company as merely amendments and/or specifications to the original filing.

(R. 443.) Because the district court denied its motion to dismiss, the State Engineer filed a petition for permission to appeal an interlocutory order. (R. 447.)

CHRONOLOGY OF EVENTS

For the Court's convenience, the following is a chronology of significant events pertaining to both the Canal Company's water right and the general adjudication:

Date	Event	Record
June 18, 1952	Canal Company memorialized its 1880 Diligence Claim	Ad. 4
March 20, 1956	General Adjudication begun by Order of Court	R. 1:i
Nov. 6, 1969	Canal Company submits Water User Claim 91-294	R.81
May 1, 1972	State Engineer completes the Proposed Determination	R. 1:iii
Dec. 15, 1972	Delbert Tidwell purportedly picks up copy of the proposed determination and signs the "Notice Receipt and Waiver"	R. 37
June 8, 1973	Canal Company files initial objection to the Proposed Determination	R. 3
June 18, 1993	Canal Company files a supplemental objection to declare Green River City's claim invalid	R. 40
June 18, 1993	Canal Company files a supplemental objection to increase the duty to six acre feet	R. 43
Oct. 13, 1999	Canal Company files a final supplemental objection to delete the footnote	R. 8
Oct. 31, 2000	State Engineer files a motion to dismiss Canal Company's "late" objection and amendments	R. 32
Feb. 7, 2003	Judge Halliday's Memorandum Decision issued	R. 444

SUMMARY OF ARGUMENT

This Court should affirm the district court's ruling for three reasons. First, unlike the State Engineer's mischaracterization of the memorandum decision, the district court properly

interpreted § 73-4-11. The plain language of § 73-4-11 requires that the State Engineer “mail[] by regular mail” a copy of the Proposed Determination to each claimant. According to the statute, each claimant then has “ninety days from such date of mailing” to file a written objection. Because the language of the statute is plain and unambiguous, this Court should affirm the memorandum decision of the district court. Although the State Engineer argues that the Canal Company waived its right to such notice, the district court never made a finding of waiver, and, in any event, the waiver should not be binding under the circumstances of this case.

Second, the district court properly exercised its discretion in crafting an equitable remedy to address the facts of this case. Because the State Engineer chose not to act in accordance with the statute, the district court determined that the ninety-day period should run from the date the State Engineer last gave notice to any claimant of Book 5 of the Proposed Determination. The district court’s decision to fashion an equitable remedy in the face of over twenty-seven years of unexplained and unexcused delay and inaction by the State Engineer was proper and should be affirmed.⁵

Finally, even if the district court incorrectly interpreted § 73-4-11 or improperly crafted an equitable remedy, the memorandum decision should still be affirmed because § 73-4-10 allows district courts to extend the time for filing objections to the Proposed Determination. Even if, *arguendo*, § 73-4-10 did not apply, the equitable doctrines of laches

⁵The State Engineer only states that “general water right adjudications take a long time.” *Appellant Brief*, 6. He does not even attempt to explain why he waited twenty-seven years to bring a motion to dismiss the Canal Company’s objection.

or waiver are appropriate alternative bases upon which to affirm the district court's ruling because of the State Engineer's inaction for over twenty-seven years.

In addition, this Court should also affirm the district court's decision to deem the Canal Company's supplements to its initial objection as amendments that relate back to the initial objection for the determination of timely filing.⁶ Section 73-4-10 grants district courts the authority to permit amendments to objections in general adjudications.

ARGUMENT

I. THE DISTRICT COURT PROPERLY INTERPRETED § 73-4-11.

In its memorandum decision, the district court interpreted § 73-4-11 of the Utah Code to require all claimants to receive notice of the State Engineer's proposed determination by mail. (R. 440.) The district court noted the undisputed fact that "[t]he State Engineer did not mail by regular mail to the Green River Canal Company a Notice of Proposed Determination." (R. 440.) In its brief, the State Engineer contends that the Canal Company waived its right to receive notice by mail and that the Canal Company submitted its objection more than ninety days from the date it received actual notice of the proposed determination. However, a plain language analysis of § 73-4-11 and a brief glance at other statutes governing general adjudications clarifies that notice of the Proposed Determination must be mailed to claimants in the general adjudication. Other Utah cases support this conclusion.

⁶In general adjudications, objections are treated like pleadings. *See* Utah Code Ann. § 73-4-14. The State Engineer files an answer to the objection and the matter is tried before the district court. *Id.* at § 73-4-15. Therefore supplements should be treated as amendments to a complaint.

Although the State Engineer argues that the Canal Company waived its right to receive notification by mail, the district court made no such finding, and waiver does not apply to the circumstances of this case.

A. A Plain Language Analysis of § 73-4-11 Supports the District Court’s Decision.

As the State Engineer correctly points out, the paramount concern of Utah’s appellate courts when interpreting statutes “is to give effect to the legislative intent, manifested by the plain language of the statute.” *State v. Huntington-Cleveland Irr. Co.*, 2002 UT 75, ¶ 13, 52 P.3d 1257 (citations omitted). This Court further clarified that “[u]nless a statute is ambiguous, we will not look beyond the plain language of the statute . . . [and will] ‘presume that the legislature used each word advisedly.’” *Id.* (quoting *C.T. ex rel. Taylor v. Johnson*, 1999 UT 35, ¶ 9, 977 P.2d 479 (further quotation and citation omitted)). When looking at the plain language of the statute, this Court “seek[s] to render all parts [of the statute] relevant and meaningful.” *Id.* (quotations and citations omitted). Conducting a plain language analysis of § 73-4-11 can lead to only one conclusion – affirmance of the district court’s ruling.

1. Nature and Purpose of General Adjudications.

The Utah Legislature long ago recognized the need to establish a procedure for filing an action to determine “the relative rights of the various claimants to the waters of” any stream or water source in the state. Utah Code Ann. § 73-4-1(1) (1989 & Supp. 2003). The purposes of establishing a special statutory adjudicative procedure were “to prevent piecemeal litigation in the determination of water rights and determine them all in one

action” and “to make a permanent record of such rights by decree of court instead of permitting the evidence thereof to rest in parole.” *Mammoth Canal & Irr. Co. v. Burton*, 70 Utah 239, 259 P. 408, 410 (1927). The Utah Code specifies the procedures that govern general adjudications. *See* Utah Code Ann. §§ 73-4-1 to 73-4-24 (1989 & Supp. 2003). Because general adjudications are statutory creatures not contemplated by our traditional judicial system, this Court has recognized that “the familiar rules of practice and procedure by which the courts are guided in ordinary lawsuits do not apply in such cases where the Legislature has laid down other and different rules relative to a particular subject.” *Mammoth Canal & Irr. Co.*, 259 P. at 411. To emphasize this point, § 73-4-3 states “[i]n all such cases the court shall proceed to determine the water rights involved in the manner provided by this chapter, and not otherwise.” Utah Code Ann. § 73-4-3.

2. The plain language of § 73-4-11

In this case, the State Engineer has requested this Court to interpret § 73-4-11, claiming that the district court’s interpretation was flawed. Section 73-4-11 outlines the procedure for the State Engineer to prepare and submit a “report to the court with his recommendation of how all rights involved [in a general adjudication] shall be determined.” *Id.* at § 73-4-11. After the State Engineer has fully considered all Water User’s Claims, surveys, records, and files, and after conducting a “personal examination of the river system or water source,” the State Engineer must create “a proposed determination of all rights to the use of the water of such river system or water source” involved in the general adjudication. *Id.* A copy of the State Engineer’s Proposed Determination must “be mailed

by regular mail to each claimant with notice that any claimant dissatisfied therewith may within ninety days from such date of mailing file with the clerk of the district court a written objection thereto duly verified on oath.” *Id.*

The plain language of the statute clearly indicates that the Legislature intended all of the claimants to receive a copy of the general adjudication by mail. The wording of the statute is not ambiguous or confusing. Delivery by mail ensures that all claimants receive notice of the proposed determination at the same time. “This Court has held that regular mailing when allowed by statute, as opposed to actual receipt, is sufficient notice.” *Jensen v. Morgan*, 844 P.2d 287, 290 (Utah 1992). Therefore, this Court should rule that the plain language of the § 73-4-11 requires notice by mailing.

B. The Contrast Between §§ 73-4-3 and 73-4-11

1. Section 73-4-3 contains two methods for providing notice

Had the Legislature intended for service any other way, the statute would have so stated. In § 73-4-3, the State Engineer must give notice to all claimants in the general adjudication when a water survey has been completed. This section specifies that notice may be given to the claimants “by registered mail or by personal service to all claimants whose names appear on the list” of claimants maintained by the State Engineer. Utah Code Ann. § 73-4-3. Claimants have “90 days after such service of such notice . . . [to] file a written statement with the clerk of the court setting forth his respective claim to the use of such water.” *Id.* The statute further specifies that “[n]otice given by mail shall be complete when the notice is mailed.” *Id.* According to this statute, either personal service or mailing notice

by registered mail fulfilled the notice requirement.

2. The Legislature intended the difference between the statutes

The general adjudication statutes contain different ways of providing notice depending on the nature of the proceeding. The Legislature specifically provided two methods of serving notice of the water survey's completion on claimants in § 73-4-3. Service of notice under this statute is allowed either by mail or by personal service on the claimant. However, § 73-4-11 provides only one method of service – by mail. As has already been mentioned, when interpreting statutes, this Court presumes that the Legislature used each word advisedly. *See Huntington-Cleveland Irr. Co.*, 2002 UT 75 at ¶ 13. If the Legislature had intended for the proposed determination to be served on claimants in a general adjudication any other way, it would have so stated as it did in § 73-4-3. Instead, the Legislature provided that the proposed determination could only be served on claimants in the general adjudication by regular mail. Indeed, the Legislature specified that the 90-day period for filing an objection begin to run “*from such date of mailing.*” Utah Code Ann. § 73-4-11 (1989) (emphasis added). To interpret § 73-4-11 any other way, this Court would have to ignore the plain language of the statute.

C. Other Utah Cases Addressing Notice Require Strict Compliance

In other water rights cases, this Court has long recognized the need to strictly comply with statutory notice requirements. In *Mosby Irrigation Company v. Criddle*, 11 Utah 2d 41, 354 P.2d 848 (1960), a water user challenged the decision of the State Engineer to reinstate an application to appropriate water with a later priority date. *Id* at 850. The State Engineer

mailed a letter to the irrigation company's designated representative by registered mail informing it that proof of appropriation was due on a certain date. *See id.* Because the irrigation company's designated representative was dead, it never received this letter. After the due date had passed, the State Engineer sent another letter to the irrigation company informing it of the lapse of the water right and identifying a procedure for reinstating the right. The irrigation company responded to this second letter, but because of the lapse, its application to appropriate was reinstated with a reduced priority date. *Id.*

On appeal, the irrigation company argued that § 73-3-16, the relevant statute concerning notice in that case, required "actual receipt of the notice." *Mosby*, 354 P.2d at 851. However, this Court held that "[t]he legislature has the right to make reasonable regulations as to public or legal notices, and the statutory requirements must be completely met in order to effect a valid notice." *Id.* Because the State Engineer had sent notice as contemplated by the statute, i.e. by registered mail, its actions complied with the statutory requirement.

In *Longley v. Leucadia Financial Corp*, 2000 UT 69, 9 P.3d 762, a water user challenged a lower court's determination that he had failed to file protest in an administrative proceeding in a timely manner. The water user alleged that a notice by publication was deficient and caused his untimely protest. According to the relevant statute, notification of an extension to put water to a beneficial use had to include information about "the diligence claimed and the reason for the request." *Id.* at ¶ 16, (quoting Utah Code Ann. § 73-3-12(2)(f)(ii)). The notification published did not contain the required information. After

reviewing cases considering public policy and strict compliance with statutory notification requirements, this Court overruled both the trial court and the court of appeals, holding that there “is no reason to treat the statutory notice requirement any less strictly in the water rights context than we treat it in the putative father and governmental immunity contexts.” *Id.* at ¶ 22. This Court noted that, just as in the governmental immunity cases, “[a]ctual notice does not cure a party’s failure to meet” statutory notice requirements. *Id.* at ¶ 21 (quoting *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 19, 977 P.2d 1201).

According to this Court’s decisions in cases interpreting other statutes of the Water Code, strict compliance with notice requirements is required. In both *Mosby Irrigation Company* and *Longley*, this Court required notification to be given strictly according to the method contained in the applicable statutes. A plain language analysis of § 73-4-11 shows that the State Engineer’s proposed determination must be mailed by regular mail to the affected claimants. It is an uncontested fact that the State Engineer did not mail the proposed determination to the Canal Company. Therefore, the Canal Company did not receive proper notice and the ninety-day period did not begin to run from the date of the signed “Notice Receipt and Waiver” but rather from the date the last such notice was mailed.

D. The Purported Waiver by the Canal Company Does not Affect the Outcome of this Case

The State Engineer asserts that the Canal Company expressly waived its right to receive notice by mail. According to his brief, “the State Engineer has allowed water users who choose to do so to receive proposed determinations in person.” *Appellant Brief*, 15. However, the district court never found that the Canal Company expressly waived notice.

Additionally, cases that the State Engineer cites in support of his waiver argument are irrelevant to this discussion. Because of the circumstances of this case, the purported waiver should not be enforced.

1. The district court made no finding of waiver

According to the State Engineer, a Delbert Tidwell signed a document entitled Notice Receipt and Waiver on behalf of the Canal Company on December 15, 1972. (R. 37.) This document states that “the undersigned waives any further service in connection therewith and consents to the entry of a final decree in this cause unless a formal protest is made by the undersigned claimant to the above-entitled court within ninety (90) days from and after date hereof.”⁷ (R. 39.) The State Engineer argues that this purported waiver removed his obligation to strictly comply with § 73-4-11. The district court, however, did not determine that the Canal Company had waived its right to notice.

Waiver is defined as “the intentional relinquishment of a known right.” *Soter’s, Inc. v. Deseret Fed. Sav. & Loan Assoc.*, 857 P.2d 935, 939-40 (Utah 1993) (quotation and citations omitted). This Court has established a three-pronged test to establish waiver, the elements of which are “(1) an existing right, benefit, or advantage; (2) knowledge of its existence; and (3) an intention to relinquish the right.” *Id.* at 940 (citations omitted). Explaining the third element, this Court noted that “the intent to relinquish a right must be distinct,” and in making such a determination, “a fact finder need only determine whether the

⁷It must be noted that this language in the alleged waiver form mischaracterizes the “written objection” provided for in § 73-4-11 as a “formal protest.”

totality of the circumstances ‘warrants the inference of relinquishment.’” *Id.* at 942.

In its memorandum decision, the district court noted as an undisputed fact that the State Engineer “*claims* that the Notice, Receipt, and Waiver signed by [Delbert] Tidwell (an alleged agent of this company) vitiates [the failure to mail notice of the Proposed Determination] and begins the running of the 90 day objection period from the *alleged* date of the Notice, to wit, December 15, 1972.” (R. 440 (emphasis added).) Although the district court recognized that the State Engineer’s had made such a claim, it did not find that the claim was valid or that if valid the document actually constituted waiver. Because it fashioned an equitable remedy that made the question of the validity of waiver irrelevant, the district court did not make any findings regarding waiver. Should this Court determine, however, that the waiver is an issue, it must remand this case to the district court for such findings to be made. *See Cazares v. Cosby*, 2003 UT 3, ¶ 24, 63 P.3d 1184.

2. Waiver cannot be established by the facts of this case

Even if waiver need be considered by the district court, facts do not exist to establish the elements of waiver. Even though waiver may be shown by a preponderance of the evidence, *Soter’s, Inc.*, 857 P.2d at 942 n.6., the State Engineer cannot meet that standard.

The only evidence supporting the contention that the Canal Company waived its right to receive notice of the Proposed Determination by mail is the “Notice Receipt and Waiver” purportedly signed by the secretary of the Canal Company, Delbert Tidwell, on December 15, 1972. (R. 37.) This document, however, is not self-authenticating and its validity was

challenged in the proceedings before the district court.⁸

The third element of waiver requires a finding of intentional relinquishment. *Soter's Inc.*, 857 P.2d at 940. The Canal Company, like all claimants in the general adjudication, was to receive notice of the proposed determination by mail according to the plain language of 73-4-11. However, the Notice Receipt and Waiver makes no mention of this notification right. In fact, the document makes no mention of the statute at all. By signing the document, a party is only informed that it “waives any further service in connection therewith.” (R.39.) There is no evidence in the record that Delbert Tidwell, who is now dead (R. 142), knew of the right to receive the Proposed Determination by mail, or that he knew he was waiving the right to such service and the right to respond within ninety-days of such service. In a case examining the intentional relinquishment of a right to file suit and submit to mandatory arbitration, this Court has held that “[w]ithout knowledge that the provision was mandatory, [a party] could not have intentionally relinquished any right.” *McCoy v. Blue Cross & Blue Shield of Utah*, 2001 UT 31, ¶ 19, 20 P.3d 901. Without evidence that Delbert Tidwell knew of the right he was waiving, there can be no determination that an intentional relinquishment of the right was made.

As is evidenced by the hundreds of pages of Notice Receipt and Waivers contained in the record (R. 13, 14, 15), the State Engineer has a policy of avoiding strict compliance

⁸The challenges in the district court included the following: that Mr. Tidwell's signature could not be authenticated, that the document apparently contained the handwriting of two different individuals, that no copy could be found in the Canal Company's records, and that there is no evidence that Mr. Tidwell was ever given a copy. (R. 65-66.)

with the statutory notice requirements by securing “waivers” from claimants to general adjudications. Instead of complying with the statute, the State Engineer has created a process that unnecessarily and unfairly lengthens and delays the general adjudication process. Book 5 of the proposed determination, which contained the recommendation concerning the Canal Company’s Water User’s Claim, was ready on May 1, 1972. (R. 1:iii.) In the record there are waivers signed by claimants picking up Book 5 of the proposed determination dated from November 1972 (R.13: tab A (John Arselmo)) until November 1973 (R.14: tab F (Nephi Foster).)⁹ It is unclear how the claimants were informed of the need to come to the State Engineer’s Office to pick up their copies of the Proposed Determination or what they were told would happen if they failed to do so.¹⁰ However, it is clear that the State Engineer had no intention of strictly complying with the statute by mailing the Proposed Determination to the claimants as required by statute.

The State Engineer did not even submit a certificate of filing with the district court until February 29, 2000. (R. 16-17.) This certificate references all of the Notice Receipt and Waivers and includes several affidavits of service by mailing. (R. 17.) The affidavits of service indicate that Book 5 was mailed to eighteen claimants on October 23, 1973 (R. 18-

⁹There is a Notice Receipt and Waiver signed by Joseph Novak dated June 4, 1974, but it is unclear whether Mr. Novak, an attorney, obtained the proposed determination on behalf of a client. (R. 14: tab N) He is not listed as a claimant in the index to Book 5.

¹⁰The Canal Company established by affidavit that the practice and policy of the State Engineer until 2000 was to consider all objections on their merits regardless of whether or not they were filed within the ninety-day period in order to make the Final Decree as accurate as possible. *See Affidavit of Harold D. Donaldson*, ¶ 6 (attached as Addendum I). (R. 149.) This affidavit was never challenged by the State Engineer.

22) and to six claimants on November 14, 1973 (R. 23-24.) There is no evidence in the record to explain this lapse of over a year between the first signed Notice Receipt and Waiver and compliance with the statutory requirements of § 73-4-11 by mailing a copy of the proposed determination to claimants. However, by failing to comply with the statute, the State Engineer unnecessarily lengthened the time for conducting the general adjudication and placed certain claimants at an unfair advantage by giving them more time to examine the proposed determination and the opportunity to review earlier-filed objections. The State Engineer should not be allowed to rely on the alleged waiver that it obtained through a policy of ignoring statutory requirements, thereby giving some people over a year to act on the information, especially when the circumstances of the “waiver” cannot be determined.

3. The shareholder cases relied upon by the State Engineer are inapplicable

In support of his argument that the Canal Company could waive its rights to notice, the State Engineer cites two cases discussing whether shareholders received proper notice of a shareholders’ meeting. *See Beggs v. Myton Canal & Irr. Co.*, 54 Utah 120, 179 P. 984, 987 (1919); *Badger v. Madsen*, 896 P.2d 20, 23-24 (Utah Ct. App. 1995). In both cases, the shareholders alleged that the notification they received did not strictly comply with statutory requirements. *See id.* In both cases, the courts held that ““if the persons entitled to notice of corporate meeting actually attend it and participate in the business there transacted, it is immaterial whether the notice was given in the manner prescribed by statute.”” *Badger*, 896 P.2d at 24 (quoting *Beggs*, 179 P. at 987). In these cases, the parties received no harm because they actually participated in the proceedings. However, in the present case, the State

Engineer is attempting to prohibit the Canal Company from participating in the general adjudication, eliminating its ability to challenge the Proposed Determination. In fact, in *Badger*, the Court recognized that when “failure to adhere to the requirements will affect a substantive right of one of the parties and possibly prejudice that party, then courts require strict compliance” with statutory notification requirements. *Badger*, 896 P.2d at 23 (quoting *Tech-Fluid Servs., Inc. v. Gavilan Operating Inc.*, 787 P.2d 1328, 1333 (Utah App. 1990)). By attempting to dismiss the objection, the State Engineer is affecting the Canal Company’s substantive right to have its objection heard on the merits.

Instead of supporting the State Engineer’s position, these cases actually support both the Canal Company’s position and the district court’s ruling that the State Engineer should have (but failed to) strictly comply with the statute. Because of the prejudicial loss of Canal Company’s substantive right to challenge the Proposed Determination and to prove that the Proposed Determination should be modified, strict compliance with the notification requirements of § 73-4-11 should be required of the State Engineer.

4. *Mullane v. Central Hanover Bank & Trust Co.*

The State Engineer also argues that a United States Supreme Court case allows personal service to substitute for strict compliance with statutory notice requirements. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the United States Supreme Court considered whether publication of notice in a newspaper was constitutionally adequate under the Due Process Clause. *Id.* at 307. The Court noted that due process is satisfied when notice “is reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 314. The State Engineer cites this case to support his contention that “[p]ersonal service of written notice . . . [is] always adequate in any type of proceeding.” *Id.* at 313, *Appellant Brief*, 16. In *Mullane*, however, the Supreme Court determined that notification by mail was appropriate. *See id.* at 319. As in the present case, *Mullane* involved “a large number of . . . interests.” *Id.* However, the case does not create a hierarchy of notice or a *carte blanche* right to ignore statutory notice requirements, nor does it establish, as the State Engineer asserts, that personal service provides “a higher form of service than service by mail.” *Appellant Brief*, 16. Rather, *Mullane* states simply that due process is met by any service reasonably calculated to provide interested parties with the opportunity to address and object to claims.

The cases cited by the State Engineer do not support his conclusion that the Canal Company actually waived its right to notice by mailing, and the district court made no finding on the existence or absence of waiver. Therefore, the State Engineer’s waiver arguments are unavailing.

II. THE DISTRICT COURT DEVELOPED AN APPROPRIATE EQUITABLE REMEDY

The State Engineer argues that the district court erred in considering the Canal Company’s equitable arguments. *Appellant Brief*, 27. According precedent laid down by this Court, the district court’s consideration of the Canal Company’s equitable arguments, to the extent that it did consider them, was entirely appropriate. “It is well established that equitable defenses may be applied in actions at law and that principles of equity apply

wherever necessary to prevent injustice.” *Borland v. Chandler*, 733 P.2d 144, 146 (Utah 1987). When fashioning an equitable remedy, “a trial court is accorded considerable latitude and discretion.” *United States Fuel Co. v. Huntington-Cleveland Irr. Co.*, 2003 UT 49, ¶ 9, 79 P.3d 945. Because the district court fashioned an appropriate equitable remedy, its decision should be affirmed.

A. After Properly Interpreting the Statute, an Equitable Remedy was Needed

Once the district court determined that § 73-4-11 required notice of the Proposed Determination be sent to claimants in general adjudications by mail, it faced the problem that the Canal Company never received notification by mail. The district court specified as an undisputed fact that “[t]he State Engineer did not mail by regular mail to the [Canal Company] a Notice of Proposed Determination.” (R. 440.) Because mailing did not occur, the running of the ninety-day period could not begin to run “from the time of such mailing.” Utah Code Ann. § 73-4-11. Therefore, the district court needed to fashion an equitable remedy to resolve the issue of timing. Because of the State Engineer’s failure to “strictly comply with the statutory language . . . and its delay in raising the defense” of timeliness, the district court determined “to treat the [Canal Company’s] objection as being timely filed.” (R. 443.) This decision is supported not only by the State Engineer’s actions (or more specifically inactions) but also by the evidentiary problems that now exist because twenty-seven years expired before any action was taken by the State Engineer.

1. The evidence has evaporated during the State Engineer’s twenty-seven year delay

This case suffers from problems that must be anticipated when proceedings have lingered for nearly fifty years. The State Engineer's motion to dismiss is based on a "Notice Receipt and Waiver" form purportedly signed by Delbert Tidwell, the secretary of the Canal Company, on December 15, 1972. However, Delbert Tidwell is dead. (R. 142.) No testimony can be obtained from him regarding the circumstances existing at the time he received the Proposed Determination, including what he may have been told by employees of the State Engineer in light of the undisputed policy of that office not to challenge objections on timeliness grounds. (R.149.) We do not know if a copy of the Notice Receipt and Waiver was retained by Mr. Tidwell or was even provided by the State Engineer. The Canal Company's records do not contain the Notice Receipt and Waiver or the Proposed Determination books supposedly given to Mr. Tidwell. (R. 66, 141-42.) The Canal Company is not alone in the loss of key evidence and witnesses; the State Engineer has also lost several key personnel involved in the prosecution of this general adjudication. None of these problems would have arisen had the State Engineer not waited nearly three decades to act.

Finally, the court record of the general adjudication is inadequate. The district court docket contains very few records prior to 2000. (R. 153.) Because there is not a docket of what was filed before 2000, the district court file may be incomplete. The file for this case has been stored in boxes at the Seventh District Court, which clerks were on at least one occasion unable to locate. (R. 153) Because of the incomplete docket and inadequate filing, it is impossible to determine whether the court file actually contains all the documents that have been submitted over the years. (*Id.*) While admittedly speculative, it is entirely possible

that the Canal Company submitted a timely objection that has since been lost. Over the decades,¹¹ much of the evidence has been lost, and determining the circumstances surrounding the receipt of the Proposed Determination has become nearly (if not entirely) impossible. This long delay supports the equitable remedy fashioned by the district court.

2. The State Engineer has routinely allowed other late objections

In addition to the long passage of time, the State Engineer's own actions in this very same general adjudication support the equitable remedy fashioned by the district court. While the State Engineer moved to dismiss the Canal Company's objection because it was untimely, he has embraced other late objections and treated other claimants more favorably. In fact, this was undisputedly his practice until 2000. (R. 149.) The State Engineer argues that there is no relationship between his actions towards these other claimants and his actions towards the Canal Company. Though the State Engineer argues that this Court should strictly apply the ninety-day period to the Canal Company's objection, the examples that follow demonstrate that his practice has not been to seek strict application the statute. By treating claimants differently, the State Engineer has prejudiced the Canal Company in his effort to keep the Canal Company's claim from being decided on the merits.

On November 14, 1973, the State Engineer mailed a copy of the Proposed

¹¹Richard Nixon was still in the White House, *The Godfather* was a brand new film, and the United States was still fighting in Vietnam when the Canal Company filed its initial objection. An entire generation has slowly passed away while the State Engineer has silently ignored the Canal Company's objection, only to suddenly act nearly three decades later, after living memory has vanished into the grave and recorded evidence has been lost to the relentless passage of time.

Determination to Sam Sampinos (the predecessor to Eureka Energy). (R. 238.) Eureka Energy filed an objection with the district court on January 23, 1981, over seven years later. (R. 239-40.) Although on April 25, 2000, the State Engineer moved to dismiss the claim for several reasons, including the untimeliness of the objection, he nevertheless requested the district court hear the merits of the objection. (R. 243.)

On November 29, 1972, J. Clarence and Kate W. Ingram signed a Notice Receipt and Wavier. (R. 246.) They filed an objection to the Proposed Determination on April 12, 1973, 135 days late. (R. 247.) Although the State Engineer challenged the objection on April 25, 2000, he did not move to dismiss for untimeliness and requested that the Proposed Determination be amended. (R. 250-51.)

On November 13, 1972, the attorney for Kaiser Steel Corp. signed a Notice Receipt and Waiver indicating receipt of the Proposed Determination. (R. 254.) The district court received Kaiser Steel Corp.'s objection to the Proposed Determination on August 2, 1973 – over eight months late. (R. 255.) On April 25, 2000, the State Engineer answered Kaiser Steel Corp.'s objection. (R. 265.) He did not move to dismiss the objection for Kaiser Steel Corp.'s failure to file the objection in a timely manner but requested that the Proposed Determination be amended in conformity with the objection. (R. 265.)

On January 30, 1973, James W. Fausett signed a Notice Receipt and Waiver indicating receipt of a copy of the Proposed Determination. (R. 268.) Mr. Fausett submitted an objection notarized on October 29, 1973, but it was not filed with the district court until June 18, 1976, almost three years later. (R. 269.) The State Engineer answered this objection on

April 25, 2000, and requested either that the objection be dismissed as untimely or that the Proposed Determination be modified. (R. 271-72.)

On November 3, 1972, Calvin K. Jacob and Milton E. Jacob each signed a Notice Receipt and Waiver indicating receipt of the Proposed Determination. (R. 275.) On August 21, 1973, their joint objection was notarized (it does not indicate when it was filed with the district court). (R. 276.) The State Engineer answered the Jacobs' objection on April 25, 2000, arguing that it should be dismissed as untimely, but nevertheless requesting that the substance of the objection be added in an addendum to the Proposed Determination. (R. 279.)

In light of the State Engineer's acceptance of the content of these objections even though he nominally asserted that the objections were untimely, the State Engineer is in no position to question the equitable remedy fashioned by the district court. Given the State Engineer's actions on other objections filed after the expiration of the ninety-day period, the district court's decision to treat the Canal Company's objection as timely was and is completely appropriate.

B. The District Court Did Not Abuse Its Discretion

When a district court invokes its equitable powers to fashion a remedy in a given situation, it "is accorded considerable latitude." *United States Fuel Co.*, 2003 UT 49, at ¶ 9 (citations omitted) Because of the State Engineer's delay and failure to strictly comply with the statute, the district court fashioned a remedy that would allow the Canal Company's objections to be heard on the merits. The district court did not abuse its discretion when it

fashioned this remedy. Therefore, this Court should affirm the decision of the district court.

III. EVEN IF THE DISTRICT COURT IMPROPERLY INTERPRETED § 73-4-11 THIS COURT SHOULD UPHOLD ON OTHER GROUNDS

Even if, arguendo, this Court determines that the district court erroneously interpreted § 73-4-11 or improperly crafted an equitable remedy and that the Canal Company's objection was indeed filed late, the district court's Memorandum Decision should still be upheld. This court has noted that it "may affirm a trial court's decision on any proper ground(s), despite the trial court's having assigned another reason for its ruling." *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 23 n.8, 82 P.3d 1064 (quoting *Gibbs M. Smith, Inc. v. United States Fid. & Guar. Co.*, 949 P.2d 337, 342 n.3 (Utah 1997) (quoting *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988))). Because of § 73-4-10 and/or the equitable doctrines of laches or waiver, this Court may if necessary affirm the district court's ruling on other grounds.

A. Section 73-4-10 Allows for the Extension of Time

According to § 73-4-10, the district court has "power . . . to extend, upon due cause shown, the time for filing any other pleading, statement, report or protest." Utah Code Ann. § 73-4-10 (1989). The plain language of this statute grants the district court the authority to consider an objection to the Proposed Determination filed beyond the ninety day statutory period. The State Engineer argues that case law prohibits late objections in general adjudications and that § 73-4-10 allows only prospective, not retroactive extensions.

1. The Canal Company established due cause

According to § 73-4-10, a court may "extend, upon due cause shown, the time for

filing any . . . protest.” Utah Code Ann. 73-4-10 (1989). The Canal Company has shown due cause why the ninety-day period should be extended to allow its original objection to be considered timely filed. As the Canal Company’s objection will be determined on its merits, there is no prejudice to other parties,¹² and where prejudice to the Canal Company is great, due cause exists to excuse the untimely filing.

While Utah appellate courts have not addressed the “due cause” standard, other courts have. The Supreme Court of New Mexico has explained that the “due cause” test “is one of objective reasonableness.” *Key v. Chrysler Motors Corp.*, 918 P.2d 350, 363 (N.M. 1996). Pennsylvania courts have equated due cause to reasonable cause and have noted that trial courts “have the discretion to determine from the record whether due cause exists.” *In re Petition to Increase Mileage Limit Levied on Real Estate from 25 Mills to 30 Mills*, 646 A.2d 61, 65 n.5 (Pa. Commw. Ct. 1994); *In re Petition of City of Clairton*, 694 A.2d 372, 374 (Pa. Commw. Ct. 1997). The State Engineer argues that the Canal Company “offered no evidence or explanation of any circumstance to justify or excuse its late filing of the 1973 Objection or any of the other objections.” *Appellant Brief*, 28. Contrary to the State Engineer’s assertion, the Canal Company provided ample evidence to show due cause.

The State Engineer insists that the Canal Company has “the burden of demonstrating that it had due cause for filing the objections late.” *Appellant Brief*, 28. The Canal Company

¹²While Lee Thayn and Green River City (the other water users who could claim to be prejudiced by the extension because they hold or held the right to divert water from the same point of diversion on the Green River) appeared in the proceeding before the district court, neither filed any objection to the extension either before the district court or here.

has established due cause to extend the time for filing because the State Engineer inexplicably delayed bringing his motion to dismiss for twenty-seven years, resulting in the loss of evidence and prejudicing the Canal Company by allowing it to believe and act on the assumption that its objections would be heard.¹³

The State Engineer's position is that the Canal Company must show that due cause existed in 1973 to extend the time for filing. This argument misses the point. Section 73-4-10 does not limit the showing of due cause to any particular time period. The untimeliness of the Canal Company's objection was not challenged until 2000. At that time, the Canal Company explained why due cause now exists to justify the extension of time and permit the adjudication of its objection on the merits. Due cause must exist at the time the petition for extension is made, and that petition was made on December 1, 2000. Because the Canal Company has shown that the intervening twenty-seven years caused witnesses and documents to disappear, the State Engineer's too-long delayed action establishes due cause to extend the time for filing the objection in 1973. The district court extended the time-period for filing the objection by determining that the ninety days began to run following the last certificate of mailing or waiver signed by claimants receiving Book 5 of the Proposed Determination. (R. 442-44.) The grant of an extension is reviewed by this Court for abuse-of-discretion. *See, e.g., Serrato v. Utah Transit Auth.*, 2000 UT App 299, 13 P.3d 616 (reviewing extension of time for appeal under URAP Rule 4(e)); *Julian v. State*, 966 P.2d

¹³Indeed, this was undisputedly the policy of the State Engineer until October of 2000. (R. 149.)

249, 254 (Utah 1998) (reviewing grant of extension for habeas corpus petition).

2. Section 73-4-10 allows retroactive extensions of time

The State Engineer argues that granting retroactive extensions of time to claimants under § 73-4-10 to file late objections causes § 73-4-11 to become superfluous and inoperative. *Appellant Brief*, 24. A brief glance at other statutes regarding general adjudications indicates the contrary. Additionally, despite the State Engineer's argument that § 73-4-11 should be treated as jurisdictional, Utah case law holds otherwise.

a. The general adjudication statutes are inclusive

When a general adjudication is initiated, the State Engineer must give notice to water users along the river system or water source who may be potential claimants that the general adjudication is now pending in district court. The State Engineer must “publish[] notice once a week for two consecutive weeks in a newspaper designated by the court as most likely to give notice to such claimants.” Utah Code Ann. § 73-4-3 (1989). This notice must inform potential claimants that they must “notify the state engineer within 90 days from the date notice is given of their names and addresses.” *Id.* After the expiration of ninety days, the State Engineer must prepare a list of all claimants, certify that the list is complete, and submit the list to the district court. *See id.* However, the statute permits the list to be amended beyond the ninety-day period to include tardy or additional claimants. “The court upon petition may by order permit the addition of names and addresses to this list at any time during the pendency of the action.” *Id.* Using the State Engineer's logic, this ninety-day period in § 73-4-3 for responding to notice once the general adjudication is initiated would

be considered superfluous and inoperative. However, the Legislature purposefully created a method for updating the general adjudication in this section.

This language demonstrates that the general adjudication statute was designed to be inclusive, not exclusive. When adjudicating the rights of all water users along an entire river system or water source, the State Engineer and the Court must ensure that all claimants receive an opportunity to be heard. Of course, it would be impossible to leave a general adjudication open and unending; however, the Legislature recognized the need to add additional claimants even after the ninety-day period has expired for interested claimants to register. Thus, it would seem that the time limits imposed in the general adjudication were established more in the interest of expediting a huge undertaking than to create technical deadlines excluding claimants from having their objections heard on the merits.

As the State Engineer points out numerous times, “general water right adjudications take a long time.” *Appellant Brief*, 6. This particular general adjudication has taken an extremely long time. Since its initiation in 1956 (R. 1:i), nearly fifty years have passed and yet no final decree has issued. The State Engineer completed his proposed determination in this general adjudication in 1972, yet the general adjudication is still open.¹⁴ Over this long period of time, the number of water users along the Green River has likely increased, the uses

¹⁴It would seem that in 1972 the bulk of the work (i.e., reviewing water user’s claims, inspecting the drainage area, mapping hydrographic surveys, and fashioning the Proposed Determination) was complete. The only task left being to resolve objections to the Proposed Determination in order to obtain a final decree. *See* Utah Code Ann. §§ 73-4-15, -17 (1989). However, the State Engineer took no action regarding the Canal Company’s objection until 2000.

of water have necessarily changed, the course of creeks and streams could have changed, the needs of the water users have changed, and even the climate and weather patterns may have changed. A general adjudication cannot be expected to occur by taking a snapshot of the water users in 1972 and expect twenty-seven years later (when the motion to dismiss was filed) or thirty-one years later (when this brief was filed) that everything has remained the same. A general adjudication was never intended to be limited to the information available only at a certain moment in time. A general adjudication is not static like regular civil proceedings. It is dynamic—like the nature of water itself.

In fact, the State Engineer recognized the need to make changes to the general adjudication and to his Proposed Determination. In oral arguments before the district court, the State Engineer admitted “we feel like it’s imperative that the State Engineer has to have the ability, if there’s mistakes in the proposed determination, to correct those mistakes.” (R. 454:30:10-12.) The State Engineer also stated “[w]e recognize at times that some – some of the things that we put in the proposed determination are mistakes and – and we feel – or we believe that in fairness we should have – we should be able to correct that in fairness to the water users.”¹⁵ (R. 454:31:20-24.) The State Engineer recognizes that it is important to be fair to all water users in conducting general adjudications.¹⁶

¹⁵From this statement, it appears that the State Engineer believes that he (rather than the courts) has the authority to determine the merits of objections to the Proposed Determination.

¹⁶Despite these admissions concerning his practice of accepting and acting upon late objections and despite acting favorably upon the portion of the Canal Company’s objection seeking an increase in irrigation duty from four to six acre feet, the State Engineer seeks to

The Legislature recognized the need to allow the general adjudication to be dynamic and allow for changes during its long pendency. It allows for new claimants to be added to the general adjudication. It allows for the court to permit amendments and to extend deadlines for filings. The State Engineer has admitted that when mistakes occur in a proposed determination, they need to be corrected, whether or not the objection giving notice of the mistake is received late. As the Legislature intended, the courts have the discretion to allow for changes while the general adjudication is proceeding. In this case, the district court properly exercised its discretion to allow the Canal Company's initial objection to be considered timely.

b. Other statutes do not limit retroactive application

The State Engineer argues that § 73-4-10 cannot be retroactively applied. According to the State Engineer, § 73-4-11 is jurisdictional “like section 63-30-12 [of the Governmental Immunity Act] and Rule 4 of the Utah Rules of Appellate Procedure.” *Appellant Brief*, 26. However, as the United States Supreme Court has noted, the time restrictions in certain statutes are not jurisdictional prerequisites “but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.” *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), and therefore can be modified retroactively. According to this analysis, § 73-4-11 is not jurisdictional.

The first problem with the comparison of § 73-4-11 to § 63-30-12 and Rule 4 is that the district court already had jurisdiction over the Canal Company and its Water User's

strictly apply the ninety-day period in this one instance.

Claim. The Canal Company became a participant in the general adjudication when it indicated that it held a water right along the Green River and filed its Water User's Claim. Compliance or non-compliance with § 73-4-11 is irrelevant to the jurisdiction of the district court. Once a general adjudication is initiated, the district court has jurisdiction over all claimants who have filed water user claims pursuant to § 73-4-3. As has already been explained, claimants can constantly be added to the general adjudication under § 73-4-3 upon petition to the district court. Therefore, there can be no question that the district court had jurisdiction over the Canal Company and its claim

Additionally, § 63-30-12 and rule 4 of the Utah Rules of Appellate Procedure both require notice of an intent to file an action before the action can actually be taken. Section 63-30-12 states “[a] claim against the state . . . *is barred unless* notice of claim is filed . . . within one year after the claim arises.” Utah Code Ann. § 63-30-12 (2003 Supp.) (emphasis added). Rule 4 states “notice of appeal . . . shall be filed with the clerk of the court within 30 days after the date of entry of the judgment or order appealed from.” However, these requirements have been held to be “precondition[s] to the bringing of” an action. *Madson v. Borthick*, 769 P.2d 245, 250 (Utah 1988). The Utah Supreme Court has noted that such requirements “creating a ‘condition precedent’ to commencing an action create a precondition to suit and that a party’s failure to satisfy a precondition results in an adjudication for ‘lack of jurisdiction.’” *McBride-Williams v. Huard*, 2004 UT 21, ¶ 12. Unlike these notices, objections to the Proposed Determination are not preconditions to suit.

As the United States Supreme Court has ruled, such statutory requirements “are

subject to waiver” and other equitable claims. *Zipes*, 455 U.S. at 393. This Court has also recently held that rule 4 of the Utah Rules of Appellate Procedure is not an absolute bar to obtaining jurisdiction for appellate review. Noting that rule 4(e) contains a “good cause” exception to the timely filing requirement, this Court stated “the recognition that there will arise circumstances when an inflexible application of the rule 4(a) deadlines would result in unconscionable injustices.” *State ex rel. M.M., A.M., and S.S. (T.S. v. State)*, 2003 UT 54, ¶ 10, 82 P.3d 1104. Even though rule 4 has a mandatory time period for filing notices of appeal, it need not be applied inflexibly in all cases.

Thus, § 73-4-11 is not jurisdictional and the ninety-day time period is subject to extension, waiver, and laches. It need not be inflexibly applied. In addition, the statutes cited by the State Engineer in favor of an absolute bar do not necessarily require the suggested unbending, strict enforcement.

3. Utah case law does not support the State Engineer’s position

According to the State Engineer, this Court’s recent determination in *United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, 79 P.3d 945, and the holdings in related cases preclude courts from excusing late objections in general adjudications. The State Engineer misreads these cases and incorrectly concludes that these cases support his position, when in reality, they indicate that late objections may be excused.

In *United States Fuel Co.*, this Court considered whether a district court had properly decided “an action to quiet title to a prior right to use water from Cedar Creek.” *Id.* at ¶ 1. Although the State-Engineer’s proposed determination gave Huntington-Cleveland Canal

Company (Huntington-Cleveland) a senior irrigation right, United States Fuel Company (USF) brought a private claim outside of the general adjudication to assert its priority right to the water claimed in the general adjudication by Huntington-Cleveland. *Id.* at ¶ 5. USF had also filed an objection to the proposed determination in the general adjudication, but its objection was filed one day late. *Id.* at ¶ 4.

On appeal, this Court held that the State Engineer's proposed determination "cannot coexist with the prosecution of an independent action which could result in a judgment inconsistent with an uncontested portion of a proposed determination." *Id.* at ¶ 12. This Court noted that the Water Code mandates that "courts must render judgment in accordance with a proposed determination where the proposed determination is uncontested at the close of the ninety-day statutory period." *Id.* at ¶ 15 (citing Utah Code Ann. § 73-4-12). Because USF's objection was filed late in the general adjudication, Huntington-Cleveland "was entitled to judgment perfecting the state engineer's" proposed determination. *Id.* at ¶ 17. Although this Court held that Huntington-Cleveland was entitled to seek judgment in the general adjudication, it did not foreclose USF from obtaining leave to file a late objection.

This Court qualified the right of Huntington-Cleveland to obtain judgment based on the uncontested portion of the State Engineer's proposed determination. First, this Court stated that Huntington-Cleveland was entitled to judgment "[u]nless and until USF sought and obtained leave of court in the general adjudication to excuse its tardy objection." *Id.* at ¶ 17. This Court also noted "that USF should be compelled to seek relief for its untimely-filed objection to [Huntington-Cleveland's] claim" in the general adjudication. *Id.* at ¶ 21.

Thus, the holding in *United States Fuel Co.* recognized that USF could have sought to have its late objection excused had it applied for such relief in the general adjudication. Although it found that USF had failed to file an objection within the ninety-day statutory period, this Court did not preclude USF from seeking relief in the general adjudication.

The State Engineer also relies on the holdings in *Jensen v. Morgan*, 844 P.2d 287, 290-91 (Utah 1992) and *Hicken v. North Ditch Irrigation Co.*, No. 960360-CA, at 2 (Utah Ct. App., March 20, 1997). In both of those cases, a lower court's decision to dismiss a claimant's objection to the State Engineer's proposed determination was upheld because the claimant had filed the objection late. *Id.* However, neither of these cases analyzed the impact of § 73-4-10 on the matter, nor does it appear that the claimants sought to have their late objection excused pursuant to that section.

In the present case, the Canal Company responded to the State Engineer's motion to dismiss by moving the district court to excuse its late objection. (R. 59.) For over twenty-seven years, the Canal Company had no indication that it had filed its objection late. As soon as the State Engineer made the Canal Company aware of the timeliness issue, the Canal Company moved for an extension of time. However, because the district court ruled that the Canal Company's filing was timely, the request to excuse the tardy filing was never addressed. Should this Court determine that the Canal Company's objection was untimely filed, it should nevertheless affirm the decision to the district court because § 73-4-10 grants authority to excuse late filings.

B. The District Court's Decision May be Affirmed under the Alternative Equitable Doctrine of Laches

Even if this Court was to determine that § 73-4-10 does not give the district court discretion to extend the time for filing objections, the equitable doctrine of laches should prohibit the State Engineer pursuing a motion to dismiss filed twenty-seven years late. Outside of the general adjudication, “a defendant’s usual recourse for a plaintiff’s failure to proceed with the litigation consists of filing a motion to dismiss for the failure to prosecute” under rule 41 of the Utah Rules of Civil Procedure; however, as the State Engineer suggests, such recourse is unavailable here. (R. 167.) Therefore, the equitable doctrine of laches is an appropriate remedy given the State Engineer’s unjustified twenty-seven year delay.

Laches is an equitable doctrine, and equity demands that it be applied in this case to avoid injustice and prejudice to the Canal Company. As the court of appeals has noted, “[l]aches is an equitable doctrine ‘based on the maxim that equity aids the vigilant, not those who slumber on their rights.’” *Nilson-Newey & Co. v. Utah Resources Int’l*, 905 P.2d 312, 314 (Utah Ct. App. 1995) (quoting *Almeida v. Almeida*, 669 P.2d 174, 180 (Haw. Ct. App. 1983) (other quotation and citation omitted)). Other courts have noted that “[l]aches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable.” *Building & Constr. Trades Council v. Public Works Bd.*, 836 P.2d 633, 636-37 (Nev. 1992). The State Engineer’s twenty-seven year delay has caused the Canal Company to rely on the fact that its objection would be heard on the merits.

According to Utah case law, “[t]o successfully assert laches one must establish that (1) plaintiff unreasonably delayed in bringing an action, and (2) defendants were prejudiced

by that delay.” *Nielson-Newey*, 905 P.2d at 314 (citing *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 726 (Utah App. 1990)). Clearly, the first element of laches is met. The State Engineer brought this motion to dismiss twenty-seven years after the Canal Company’s objection was filed. No excuse, whether it is lack of funding or the State Engineer’s bald assertion that “general water rights adjudications take a long time,” justifies this long delay.

The prejudice element is also met in this case. In *Nilson-Newey*, the court of appeals upheld the trial court’s dismissal of an action based on the doctrine of laches because the plaintiff failed to bring an action for an accounting and distribution of profits for over 35 years. *Id.* at 316. The court noted the defendants’ disadvantage because “many of the documents that might clarify these transactions are no longer available . . . that all but one of the original syndicate members is dead, and that witnesses who might clarify existing records and documents substantiating the current controverted relationship are dead.” *Id.* Because of these difficulties, the court held “that defendants would be disadvantaged if plaintiff were allowed to prosecute its claims.” *Id.*

Numerous other courts have stated that the loss of evidence due to another party’s unreasonable delay constitutes injury sufficient to apply laches. *See e.g., Fontana v. Steenson*, 929 P.2d 336, 339 (Or. App. 1996) (prejudice may be shown “by showing that a plaintiff’s delay caused the loss of critical documentary evidence”); *Maletis, Inc. v. Schmitt Forge, Inc.*, 870 P.2d 865, 868 (Or. App. 1994) (“prejudice may take the form of a disadvantageous change in position, or a loss of witnesses or documents”); *Anderson v. Anderson*, 585 P.2d 938, 947 (Haw. 1978) (stating that laches applies when, ““during

inexcusable delay, the evidence has become obscured and, under the circumstances of the case, it is too late to ascertain the merits of the controversy” (citation omitted)).

In this case, the Canal Company faces similar disadvantages. Due to the passage of so many years, records have been lost or inadvertently misplaced, witnesses’ memories have faded, and key witnesses have died. (R. 65-67.) Because of the loss of so much evidence, the Canal Company has not been able adequately respond to the State Engineer’s allegations. Additionally, the State Engineer’s only support for its motion to dismiss is a document of questionable evidentiary value. For over twenty-seven years, the Canal Company believed that its objection was valid and would be considered in the general adjudication. It has now acted for over thirty years on the assumption that its objection was timely. For the State Engineer now to seek dismissal of the Canal Company’s claims is obviously inequitable. Because both elements of the laches exist, this Court could uphold the district court’s ruling on this alternative basis.

C. The District Court’s Decision can be Affirmed Under the Alternative Equitable Doctrine of Waiver by the State Engineer

The equitable doctrine of waiver provides an additional ground upon which this Court could uphold the district court’s decision should it determine that the district court improperly interpreted § 73-4-11. As has been mentioned earlier, “[a] waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.”

Soter’s, Inc. v. Deseret Federal Sav. & Loan Ass’n, 857 P.2d 935, 942 (Utah 1993) (quoting *Phoenix Ins. Co. v. Heath*, 90 Utah 187, 61 P.2d 308, 311-12 (1936)). Waiver may be

inferred by “the totality of the circumstances.” *Id.* Silence may constitute waiver if “there is some duty or obligation to speak.” *Id.* at 940 (quotation and citation omitted). By its silence for more than twenty-seven years, the State Engineer has waived his right to seek dismissal of the Canal Company’s objection.

The State Engineer has a statutory duty to aid the court in the general adjudication. Utah Code Ann. §§ 73-4-1(1), -14 (1989 & Supp. 2003). It was therefore the State Engineer’s duty to monitor the responses and objections to the Proposed Determination, at least within some reasonable time. However, the State Engineer apparently failed to comply with this obligation. Just as there is a time limit on when a water claimant may protest the proposed determination, there should be some reasonable time limit within which the State Engineer must challenge the objection and hearing be had regarding the same.

In addition, the State Engineer has acted differently concerning the untimely complaints of other water users. In several cases, the State Engineer answered objections and requested that the proposed determination be modified or that an addendum be added to the proposed determination pursuant to those objections. Each of these objections, like the Canal Company’s, was filed after the expiration of the ninety-day objection period. Despite the lateness of these objections, however, the State Engineer requested that each objection be fully or at least partially considered on the merits. (R. 149.) The State Engineer has not afforded the Canal Company the same deference to its meritorious objection.¹⁷ For reasons

¹⁷The State Engineer has never challenged the veracity of Jack Barnett’s affidavit testimony, presented in support of the Canal Company’s objection to the reduction of the Canal Company’s water right to 60 rather than the necessary 80 cfs.

unknown to the Canal Company, the State Engineer has determined to treat the Canal Company differently by seeking to dismiss its objections without consideration on the merits while recommending that other untimely objections be incorporated into the proposed determination. By waiving his right to reject untimely objections submitted by other claimants, the State Engineer has also waived his right to reject the Canal Company's objections.

By failing to act for over twenty-seven years when he had a duty to do so, the State Engineer has waived his opportunity to dismiss the Canal Company's objections for untimeliness.¹⁸ Because waiver is an appropriate equitable remedy, this Court should uphold the district court's decision even if it determines that other reasons do not.

IV. THE DISTRICT COURT PROPERLY CONSIDERED SUPPLEMENTS TO THE OBJECTION AS AMENDMENTS TO THE ORIGINAL OBJECTION

In its memorandum decision, the district court ruled that the Canal Company's initial objection was timely filed and that "the 'supplemental filings' . . . [were] merely amendments and/or specifications to the original filing." (R. 443.) According to § 73-4-10, the district court has the "power to allow amendments to any petition, statement or pleading." If this Court determines that the Canal Company's original pleading was timely, then the district court's decision to consider the Canal Company's subsequent objections as amendments to the original should also be affirmed because the district court did not abuse his discretion.

¹⁸It is ironic that the State Engineer is attempting to dismiss an objection that was, according to the State Engineer, 93 days late by filing a motion to dismiss twenty-seven years, or over 9855 days, later.

See Smith v. Grand Canyon Expeditions Co., 2003 UT 57, ¶ 31, 84 P.3d 1154.

According to the State Engineer, “the major reason for the statutory time limit for filing objections is so water users have notice of issues that affect their water rights [and] “[s]upplemental’ or ‘amended’ objections that raise new issues subvert this purpose.”¹⁹ *Appellant Brief*, 34. The State Engineer asserts that §§ 73-4-11 and 73-4-10 act as a bar to new issues raised by “cunning water users.”²⁰ *Id.* Additionally, the State Engineer asserts that the word “objection” or “protest” does not appear in the list of amendable documents in § 73-4-10. The State Engineer’s arguments are hypertechnical and cannot withstand close scrutiny.

In similar situations, this Court has held that trial courts may permit amendments to claims even though certain statutory time limits have passed. In *Meyers v. Interwest Corp.*, 632 P.2d 879, 880 (Utah 1981), the dispute concerned “a defect on the face of the summons

¹⁹Of course, if this is the main purpose for the statutory time limit, then it also supports the conclusion that the statutory time limit exists to ensure that all claimants receive notice of the proposed determination at the same time and that all objections are required to be filed at the same time also, i.e., ninety days after mailing, so that water users all promptly “receive notice of issues that affect their water rights.” *Appellant Brief*, 34. As has already been mentioned, this Court has held that another purpose of the general adjudication is to avoid piecemeal litigation. *See Mammoth Canal & Irr. Co. v. Burton*, 70 Utah 239, 259 P. 408, 410 (1927). The practice of the State Engineer to distribute the Proposed Determination randomly over several years does exactly the opposite.

²⁰All the State Engineer needs to do to prevent “cunning water users” from amending their objection is to timely file an answer to such objections. The goal of general adjudications should not be to avoid adjudications of the merits of water user’s claims. On the contrary, the goal is to achieve the most correct and accurate adjudication of all rights in a particular drainage area. All the Canal Company desires is the right to have its day in court and to attempt to prove it needs 80 cfs.

served on defendant.” On appeal, this Court noted that “Rule 4(h) of the Utah Rules of Civil Procedure specifically allows an amendment to be made to the summons ‘at any time.’” *Id.* at 881. Even though the statute of limitations ran prior to the filing of the motion to amend, “the amendment relates back to the initial summons.” *Id.* at 882. In support of this holding, this Court noted that Rule 15(e), concerning amendments to complaints, also permits amendments to “relate back to the initial filing of the complaint . . . notwithstanding the intervening running of a statute of limitations.” *Id.* Such rules are “liberally construed to afford litigants their day in court on the merits of their claim.” *Id.* Finally, this Court stated “[i]n the absence of prejudice, it is appropriate to pursue that policy which favors resolution of disputes on the merits rather than technicalities.” *Id.* According to this Court, amendments should be liberally allowed in the interest of justice and relate back to the initial filing even though statutory time periods have run.

In *Lawson v. McBride*, 71 Utah 239, 264 P. 727 (1928), a water user appealed a decree entered by a district court concerning the extent and nature of the water user’s water right. On review, this Court reversed the decree based on its determination that it was against the clear weight of the evidence. *Id.* at 729. Additionally, this Court held that the district court “erred in not permitting the plaintiff to amend his complaint” to conform to the evidence. *Id.* In that case, the district court abused its discretion by denying the water user to opportunity to amend. In this case, the district court appropriately exercised its discretion.

Reviewing motions to amend, Utah’s appellate courts have suggested several factors to consider including: “(1) the timeliness of the motion; (2) the justification for delay; and

(3) any resulting prejudice to the responding party.” *Atcitty v. Bd. of Educ. of the San Juan County Sch. Dist.*, 967 P.2d 1261, 1264 (Utah Ct. App. 1998). In this case, amendments to the initial objection were filed in 1993 and 1999; however, no proceeding had taken place since the initial objection was filed and the general adjudication was in the exact same procedural posture when those amendments were filed. Additionally, there is no resulting prejudice to the responding party. The State Engineer is not prejudiced by any of these amendments because the State Engineer is not a water user competing for the same water source and has no right or interest that would be affected by amending the Canal Company’s objection. Indeed, the State Engineer failed to act for twenty-seven years, indicating his disinterest in the Canal Company’s position. In addition, no other claimant in the general adjudication will be affected.²¹ The State Engineer has admitted that no one else has objected to the Canal Company’s water user claim. (R. 454:150:3-4.) Because no one was harmed, there was no reason for the district court not to allow the Canal Company’s amendments.

Section 73-4-10 places no limitations on the timing, subject, or number of amendments that can be permitted by the district court, though it clearly bestows on the district court the discretion to allow amendments. Amendments to objections, like amendments to summonses and complaints, should be liberally granted to allow claimants’ objection to be heard on the merits. Because the statute allows for amendment, and because analogous cases require courts to allow such amendments, the district court did not abuse its

²¹Indeed, neither of the other two water users who appeared in the proceeding below bothered to object.

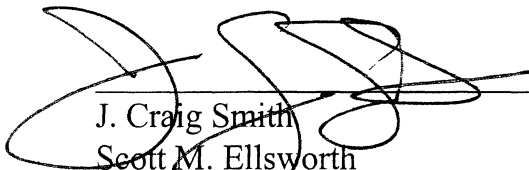
discretion in allowing the Canal Company's subsequent objections to relate back to the initial filing. Therefore, the district court's decision should be affirmed.

CONCLUSION

This Court should affirm the decision of the district court. All the Canal Company seeks is its day in court and the opportunity to prove the need to continue to receive the water it is entitled to under its 1952 and 1969 claims. The State Engineer's recent change from accepting objections regardless of when filed demonstrates a shift away from the goals of the general adjudication and is in apparent contradiction of the State Engineer's role to correctly apportion Utah's scarce and valuable water resources among competing users.

Although the State Engineer apparently may prosecute general adjudications at any pace he desires, general adjudications cannot be endlessly delayed by him without certain consequences. When the State Engineer chooses to wait twenty-seven years to seek dismissal of an objection on a technical procedural ground, he must know that valuable evidence that may excuse or explain the reason for the initial untimely filing will invariably be lost (including crucial first-person testimony). The district court reached the appropriate remedy, allowing the objection proceed on the merits. For the foregoing reasons, this Court should affirm the district court's memorandum decision.

Dated this 24th day of March, 2004, **SMITH HARTVIGSEN, PLLC**

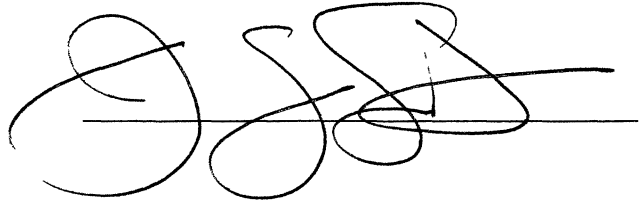


J. Craig Smith
Scott M. Ellsworth
R. Christopher Preston
Attorneys for Green River Canal Company

CERTIFICATE OF SERVICE

On the 24th day of March, 2004, a true and correct copy of the foregoing **APPELLEE BRIEF** was mailed, first-class United States mail, postage prepaid, to each of the following:

L. Ward Wagstaff
Julie I. Valdes
Mark L. Shurtleff
UTAH ATTORNEY GENERAL
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116

A handwritten signature in black ink, appearing to be "M. Shurtleff", written over a horizontal line.

Tab A

C

UTAH CODE, 1953

TITLE 73. WATER AND IRRIGATION

CHAPTER 4. DETERMINATION OF WATER RIGHTS

73-4-3 Procedure for action to determine rights --Notice to and list of claimants --Manner of giving notice of further proceedings --Duties of engineer --Survey --Notice of completion.

Upon the filing of any action by the state engineer as provided in Section 73-4-1, or by any person or persons claiming the right to the use of the waters of any river system, lake, underground water basin, or other natural source of supply, which involves a determination of the rights to the major part of the water of such source of supply or the rights of ten or more of the claimants of such source of supply, the clerk of the district court shall notify the state engineer that such suit has been filed. The state engineer then shall give notice to the claimants by publishing notice once a week for two consecutive weeks in a newspaper designated by the court as most likely to give notice to such claimants. The notice shall set forth that: such an action has been filed; the name of the action and the name and location of the court in which the action is pending; the name or description of the water source involved; and shall require claimants to the use of water therefrom to notify the state engineer within 90 days from the date notice is given of their names and addresses. After the expiration of 90 days the state engineer shall prepare a list which shall include the names and addresses of all claimants then of record in his office and all claimants who have notified the state engineer of their addresses, and this list shall be certified by the state engineer as complete and filed with the clerk of the court. The court upon petition may by order permit the addition of names and addresses to this list at any time during the pendency of the action, and the clerk of the court may, without court order, upon notice from the claimant note any change of address. If any claimant appears in this action by an attorney, the clerk shall note on the list the address of the attorney. After the list is filed by the state engineer, notice of further proceedings, after service of summons, may be given without court order by mailing a copy thereof to the persons listed at the addresses listed and by mailing a copy thereof to any attorney of record for any such person, and notice may be given to such listed persons and to all other claimants by publication in the manner and for the time prescribed by order of the district court. When such statement or list shall have been filed, the state engineer shall begin the survey of the water source and the ditches, canals, wells, tunnels, or other works diverting water therefrom; and as soon as this survey has been completed, the state engineer shall file notice of completion with the clerk and give notice by registered mail or by personal service to all claimants whose names appear on the list that the survey has been completed and that their claims are due within 90 days from the date of notice, and within 90 days after such service of such notice each claimant must file a written statement with the clerk of the court setting forth his respective claim to the use of such water. Notice given by mail shall be complete when the notice is mailed. When such a suit has been filed by the state engineer as provided by Section 73-4-1, or by any person or persons involving the major part of the waters of any river system, lake, underground water basin, or other source of supply, or the rights of ten or more of the water claimants of such source of supply, whether such suit is filed prior to or after the enactment hereof, it shall be the duty of the state engineer upon receiving

notice thereof to examine the records of his office with respect to the water source involved, and if they are incomplete to make such further investigation and survey as may be necessary for the preparation of the report and recommendation as required by Section 73-4-11. In all such cases the court shall proceed to determine the water rights involved in the manner provided by this chapter, and not otherwise.

History: L. 1919, ch. 67, § 22; R.S. 1933, 100-4-3; L. 1935, ch. 105, § 1; 1939, ch. 112, § 1; C. 1943, 100-4-3; L. 1943, ch. 107, § 1; 1948 (1st S.S.), ch. 14, § 1; 1979, ch. 252, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

NOTES TO DECISIONS

ANALYSIS

- Adjudication of rights.
- Jurisdiction and venue.
- Private suits.
- Procedure.
- Written statement.

Adjudication of rights.

The statute clearly contemplates that the individual rights of each claimant shall be adjusted and adjudicated. *Huntsville Irrigation Ass'n v. District Court*, 72 Utah 431, 270 P. 1090 (1928).

In action to quiet title to water rights in Virgin River water system, court did not err in also determining rights to Summit Spring, where all parties sought determination of spring rights, no useful purpose would be served in compelling retrial thereof, and variance with respect to whether spring was part of river water system was not objected to. *St. George & Wash. Canal Co. v. Hurricane Canal Co.*, 93 Utah 262, 72 P.2d 642 (1937).

In a general determination suit the rights to the use of water may be determined not only as between and among the claimants and users on one side and the state of Utah on the other, but also as between and among all the claimants and users thereof. In *re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah 1956); *Huntsville Irrigation Ass'n v. District Court*, 72 Utah 431, 270 P. 1090 (1928).

Tab B

UTAH CODE, 1953
TITLE 73. WATER AND IRRIGATION
CHAPTER 4. DETERMINATION OF WATER RIGHTS
73-4-10 Amendment of pleadings --Extensions of time.

The court shall have power to allow amendments to any petition, statement or pleading; to extend as provided in this title the time for filing any statement of claim; and to extend, upon due cause shown, the time for filing any other pleading, statement, report or protest.

History: L. 1919, ch. 67, § 31; R.S. 1933 & C. 1943, 100-4-10.

NOTES, REFERENCES, AND ANNOTATIONS

NOTES TO DECISIONS

Amendment of pleadings.

Complaint, in action by alleged prior appropriator to quiet his title to all the waters of a stream, may be amended to conform to the evidence. *Lawson v. McBride*, 71 Utah 239, 264 P. 727 (1928).

U.C.A. 1953 § 73-4-10, UT ST § 73-4-10

Statutes current through 2003 2nd Special Session. Annotations current through UT 51 (11/14/2003), 2003 Utah APP 389 (11/14/2003 and November 14, 2003 (Federal Cases)).

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END OF DOCUMENT

Tab C

C

UTAH CODE, 1953

TITLE 73. WATER AND IRRIGATION

CHAPTER 4. DETERMINATION OF WATER RIGHTS

73-4-11 Report and recommendation by engineer to court.

Within thirty days after the expiration of the 60 days allowed for filing statements of claims, the state engineer shall begin to tabulate the facts contained in the statements filed and to investigate, whenever he shall deem necessary, the facts set forth in said statements by reference to the surveys already made or by further surveys, and shall as expeditiously as possible make a report to the court with his recommendation of how all rights involved shall be determined.

After full consideration of the statements of claims, and of the surveys, records, and files, and after a personal examination of the river system or water source involved, if such examination is deemed necessary, the state engineer shall formulate a report and a proposed determination of all rights to the use of the water of such river system or water source, and a copy of the same shall be mailed by regular mail to each claimant with notice that any claimant dissatisfied therewith may within ninety days from such date of mailing file with the clerk of the district court a written objection thereto duly verified on oath. The state engineer shall distribute the waters from the natural streams or other natural sources in accordance with the proposed determination or modification thereof by court order until a final decree is rendered by the court; provided, if the right to the use of said waters has been theretofore decreed or adjudicated said waters shall be distributed in accordance with such decree until the same is reversed, modified, vacated or otherwise legally set aside.

History: L. 1919, ch. 67, § 32; R.S. 1933, 100-4-11; L. 1937, ch. 130, § 1; C. 1943, 100-4-11.

NOTES, REFERENCES, AND ANNOTATIONS

Compiler's Notes. --Section 73-4-5 allows ninety days for filing statements of claims, not sixty days as set out in the first paragraph of this section.

NOTES TO DECISIONS

ANALYSIS

Tab D

Claim No 46
Filed June 18 1952
Rec By L E Morrison
Rec \$2.50 fee 27725
Platted 6-26-1952 R.C.T.
(D-20-16) 17 d o b -
Same point as Cor by A 11479

STATEMENT OF WATER USERS CLAIM
TO DILIGENCE RIGHTS
STATE OF UTAH

Claim to surface water by right of use prior to March 12 1903 is hereby made and filed with the State Engineer, together with a filing fee of \$2.50 and submitted in accordance with Sections 100 2 14 and 100 5-15 Utah Code Annotated, 1943, as amended by the Session Laws of 1949

1 Name of Claimant Greenriver Canal Company (Incorporated)
(IF A COMPANY STATE WHETHER OR NOT INCORPORATED)
2 Postoffice address Dalbert Tidwell (President) O.K. Anderson (Secretary)
(IF A COMPANY GIVE NAME AND ADDRESS OF PRESIDENT AND SECRETARY)
3 Name of particular spring, spring area, stream or tributary from which water is diverted
is Green River in Emery County

4 Nature, Amount and Annual Period of Use (by month and day)	{	Irrigation	Sec Ft 60	from March 15 to Nov 1	Ac Ft 37.480
		Mining	Sec Ft.	from to	Ac Ft
		Domestic	Sec Ft	from to	Ac Ft
		Municipal	Sec Ft	from to	Ac Ft
		Stockwatering	Sec Ft 20	from Jan 1 to Dec 30	Ac Ft 14,500
		Power	Sec Ft.	from to	Ac Ft
(STRIKE OUT ONES NOT NEEDED)					
(IF FOR USE OTHER THAN HERE LISTED SET FORTH IN BLANK SPACE)					

5 Direct Flow Appropriation

(a) Point of diversion from spring spring area stream or tributary (This and point of rediversion must be described with reference to U S Government survey corner) (Strike words not needed)

North 60°00' East 4540 ft. from the Southwest Corner of Section 17,
Township 20, South, Range 16 East Salt Lake Base Meridian

(b) Point of rediversion _____

6 Appropriation for Storage Purposes

(a) Name of reservoir if known by name _____

(b) *Maximum capacity of reservoir in acre feet (Submit area-capacity table) _____

(c) Year construction commenced _____, completed _____, water first used _____

(d) Location of reservoir (State legal subdivisions inundated in whole or part) _____

(e) Is reservoir located on or off stream from which water is claimed for storage purposes? _____

(f) Period of Storage _____ Annual Period of Use _____
(GIVE BEGINNING AND ENDING DATES)

(g) At full stage Area in acres inundated _____ Max depth in feet _____

(h) If a yearly record of amount of water stored in past is available, give same, on sheet attached

(i) *Is reservoir drained each year? _____ No of fillings per year _____

*See rules and regulations

Paragraph 8-A

<u>Acres</u>	<u>Description</u>	<u>Section</u>	<u>Township</u>	<u>Range</u>	<u>Salt Lake Meridian</u>
160	E $\frac{1}{2}$	9	21	16	"
40	SE $\frac{1}{4}$ -SW $\frac{1}{4}$	"	"	"	"
20	NE $\frac{1}{4}$ -SW $\frac{1}{4}$	"	"	"	"
15	SE $\frac{1}{4}$ -NW $\frac{1}{4}$	"	"	"	"
40	NE $\frac{1}{4}$ -NW $\frac{1}{4}$	"	"	"	"
80	N $\frac{1}{2}$ -NE $\frac{1}{2}$	16	21	16	"
40	NE $\frac{1}{4}$ -NW $\frac{1}{4}$	"	"	"	"
40	SW $\frac{1}{4}$ -NE $\frac{1}{4}$	"	"	"	"
20	SE $\frac{1}{4}$ -NW $\frac{1}{4}$	"	"	"	"
20	NE $\frac{1}{4}$ -SE $\frac{1}{4}$	"	"	"	"
40	NW $\frac{1}{4}$ -SE $\frac{1}{4}$	"	"	"	"
40	NE $\frac{1}{4}$ -SW $\frac{1}{4}$	"	"	"	"
30	SE $\frac{1}{4}$ -SW $\frac{1}{4}$	"	"	"	"
20	SE $\frac{1}{4}$ -SE $\frac{1}{4}$	"	"	"	"
40	SW $\frac{1}{4}$ -SE $\frac{1}{4}$	"	"	"	"
320	E $\frac{1}{2}$	9	21	16	"
20	SW $\frac{1}{4}$ -SW $\frac{1}{4}$	27	20	16	"
40	NW $\frac{1}{4}$ -SW $\frac{1}{4}$	27	20	16	"
20	SW $\frac{1}{4}$ -NW $\frac{1}{4}$	27	20	16	"
40	SE $\frac{1}{4}$ -SE $\frac{1}{4}$	28	20	16	"
15	SW $\frac{1}{4}$ -SE $\frac{1}{4}$	28	"	"	"
10	NE $\frac{1}{4}$ -SE $\frac{1}{4}$	"	"	"	"
40	NW $\frac{1}{4}$ -NW $\frac{1}{4}$	3	21	16	"
20	NE $\frac{1}{4}$ -NW $\frac{1}{4}$	3	21	"	"
160	W $\frac{1}{2}$ -W $\frac{1}{2}$	10	21	"	"

Paragraph 8-D

<u>Acres</u>	<u>Description</u>	<u>Section</u>	<u>Township</u>	<u>Range</u>	<u>Salt Lake Meridian</u>
30 ✓	NW$\frac{1}{4}$-NW$\frac{1}{4}$	15	21	16E	"
80 ✓	N$\frac{1}{2}$-NE$\frac{1}{4}$	16	"	"	"
40 ✓	NE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
20 ✓	SE$\frac{1}{4}$-NE$\frac{1}{4}$	"	"	"	"
40 ✓	SW$\frac{1}{4}$-NE$\frac{1}{4}$	"	"	"	"
20 ✓	SE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
20 ✓	NE$\frac{1}{4}$-SE$\frac{1}{4}$	"	"	"	"
40 ✓	NW$\frac{1}{4}$-SE$\frac{1}{4}$	"	"	"	"
40 ✓	NE$\frac{1}{4}$-SW$\frac{1}{4}$	"	"	"	"
30 ✓	SE$\frac{1}{4}$-SW$\frac{1}{4}$	"	"	"	"
20 ✓	SE$\frac{1}{4}$-SE$\frac{1}{4}$	"	"	"	"
40 ✓	SW$\frac{1}{4}$-SE$\frac{1}{4}$	"	"	"	"
320	E$\frac{1}{2}$	9	"	"	"
40 ✓	SE$\frac{1}{4}$-SW$\frac{1}{4}$	"	"	"	"
20 ✓	NE$\frac{1}{4}$-SW$\frac{1}{4}$	"	"	"	"
15 ✓	SE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
40 ✓	NW$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
160 ✓	W$\frac{1}{2}$-W$\frac{1}{2}$	10	"	"	"
20 ✓	SE$\frac{1}{4}$-SW$\frac{1}{4}$	"	"	"	"
40 ✓	NE$\frac{1}{4}$-SW$\frac{1}{4}$	"	"	"	"
40 ✓	SE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
30 ✓	NE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
35 ✓	SW$\frac{1}{4}$-SE$\frac{1}{4}$	4	"	"	"
20 ✓	SE$\frac{1}{4}$-SE$\frac{1}{4}$	"	"	"	"
20 ✓	NW$\frac{1}{4}$-SE$\frac{1}{4}$	"	"	"	"
10 ✓	NE$\frac{1}{4}$-SE$\frac{1}{4}$	"	"	"	"
20 ✓	SE$\frac{1}{4}$-NE$\frac{1}{4}$	"	"	"	"
20 ✓	NE$\frac{1}{4}$-NE$\frac{1}{4}$	4	"	"	"
40 ✓	NW$\frac{1}{4}$-NW$\frac{1}{4}$	3	"	"	"
20 ✓	NE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
20 ✓	SW$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
10 ✓	SE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
20 ✓	SE$\frac{1}{4}$-SE$\frac{1}{4}$	35	20	16E.	"
20 ✓	NE$\frac{1}{4}$-SE$\frac{1}{4}$	33	"	"	"
40	SW$\frac{1}{4}$-NE$\frac{1}{4}$	34	"	"	"
40	SE$\frac{1}{4}$-SW$\frac{1}{4}$	28	"	"	"
15 ✓	SW$\frac{1}{4}$-SE$\frac{1}{4}$	28	"	"	"
10 ✓	NE$\frac{1}{4}$-SE$\frac{1}{4}$	28	"	"	"
20	SW$\frac{1}{4}$-SW$\frac{1}{4}$	27	"	"	"
40	NW$\frac{1}{4}$-SW$\frac{1}{4}$	"	"	"	"
20	SW$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
15	SE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
10	NE$\frac{1}{4}$-NW$\frac{1}{4}$	"	"	"	"
10	SE$\frac{1}{4}$-SW$\frac{1}{4}$	22	"	"	"
5	SE$\frac{1}{4}$-NW$\frac{1}{4}$	22	"	"	"
10	NE$\frac{1}{4}$-NW$\frac{1}{4}$	22	"	"	"

1635.00

- (j) Give following information as to feeder canal in case reservoir is off source of supply,
(1) Maximum carrying capacity of feeder canal in second feet _____
(2) Point of diversion of supply canal from stream or tributary (Must be described with reference to U. S. Government survey corner) _____

7. Diverting Works

- (a) Diverting dam nature type and dimensions of Reinforced Concrete, Gravity, Length 810 ft., Ht. 13 f
(b) Flowing or pump well Diam x Depth x Width 31 ft.
(c) Headgate nature and type of x
(d) Water measuring device nature and type of Concrete Weir
(e) Canal Length 74,000 ft. Width at top 30 ft. Width at bottom 14 ft.
Depth of water 3.50 Grade per 1000 feet 0.338 Maximum carrying capacity in second feet _____ Material through which canal passes Shale Rock, and Heavy Sandy Loam
(f) Flume Material Steel Length 86 ft. Width 60 in. Depth of Water 3.00 Gradient 2"/100'
(g) Pumps Number _____ Type _____ Capacity _____ Head _____
Make _____ How operated _____
(h) Date when work on diverting system was first begun Feb. 23, 1892
(i) Nature of such work Timber-Rock Filled Cribb Dam--Brush and Rocks
(j) Date when diverting system was completed 1880
(k) Date when water was first used April 1881 Quantity used 25 c.f.s.
Area irrigated 1903 by surface water 1800 In 1935 by underground water _____
(l) If canal or well has been enlarged, give date of enlargements and additional capacity April 1910 --25 c.f.s.

8. Where Water Is Used for Irrigation Purposes

- (a) Area and legal subdivisions of land embracing area irrigated the first year (give dates) _____
(b) Area and legal subdivisions of land embracing area irrigated each year thereafter (give dates) _____
See Attached Sheet
(c) Date of last enlargement of irrigated area 1903
(d) Give area in each legal subdivision of land (40-acre tracts) irrigated at present time, if only parts of legal subdivisions are irrigated give acreage in each 40-acre legal subdivision (attach sheet if necessary)
See Attached Sheet
(e) Character of soil irrigated Sandy Loam depth 8 ft. Character of subsoil Gravel
(f) Kind of crops raised last year and acreage of each Hay--600 Ac., Grain--300 Ac., Cantalopes--300 Ac., Corn 160 Ac., Orchard--20 Ac., Melons--40 Ac., 55 Acres Miscellaneous Truck Products.
(g) Maximum acreage of various crops irrigated at any time during period of use 1435
(h) Minimum acreage of various crops irrigated at any time during period of use 1275
(i) Do you use water for irrigation outside the growing season? No
(1) If so, to what extent and purpose? _____
(2) If for irrigation, what crops? _____
(j) Is any portion of the land listed as irrigated water-logged? No
If so, how much in each legal subdivision? _____
(k) Is any portion of the land listed as irrigated drained by artificial means? No
(l) Do you get water under a partnership ditch? No If so, give names and addresses of partners and amount of land each irrigates at present _____

9. Where Water Is Used for Power Purposes

- (a) Water wheels used No _____ Type _____ Actual Capacity of each _____
(b) Head under which each wheel operates _____ Rated H P of each _____

- (c) Purpose for which power is used _____
(d) Place or places where power is used _____
(e) Point where water is returned to the natural stream (Must be described with reference to U S Government survey corner) _____

10 Where Water Is Used for Mining Purposes

- (a) Name of mining district _____ Name of Mine _____
(b) Kind of ore or ores mined _____
(c) Purpose of Use _____
(d) Point where unused water, if any, is returned to the natural stream (Must be described with reference to U. S Government survey corner) _____

11. Where Water Is Used for Stock Watering:

- (a) Type of conserving works
(1) Troughs, number and size Watered in irrigation lateral ditches running through fields
(2) Ponds, number, size and depth _____
(3) Sumps, number, size and depth _____
(b) Number of each kind of range stock watered 2000 Cattle--3000 Sheep--100 Horses

12 Where Water Is Used for Domestic and Municipal Purposes:

- (a) If for domestic use
(1) Place or places by legal subdiv of 40 ac where used _____
(2) Number of persons and families supplied 75
(3) Number of each kind of domestic stock watered (not included in par. 11) _____
(4) Total acreage of gardens and lawns irrigated (not included in par 8) 80 Acres

(b) If for municipal use
(1) Name of city or town supplied Green River City
(2) Population 1200
(3) Approximate quantity of water in gallons per day used 145

13. Where Water is Used for a Purpose Not above Enumerated. (Describe in detail, in space below the nature and extent of such use.)

14. Water measurement was made by Current Meter on 8 day of August 1950, by W. H. Dean method and reported in detail on attached statement.

SIGNATURE OF CLAIMANT

STATE OF UTAH }
COUNTY OF Emery } ss

(To be used if claimant is an individual)

_____, being first duly sworn, upon oath deposes and says that he is the claimant whose name appears hereon, that he has read the foregoing statement of his claim and knows the contents thereof, and that he has signed the same, and that the answers set forth therein are true to his best knowledge and belief.

SIGNATURE OF CLAIMANT

Subscribed and sworn to before me this _____ day of _____, 19____

My commission expires: _____

NOTARY PUBLIC

STATE OF UTAH }
COUNTY OF Emery } ss
Delbert Tidwell

(To be used if claimant is a corporation, co-partnership or association)

_____, being first duly sworn, upon oath deposes and says that he is the _____ of the organization above named, that he makes this certification on behalf of said organization, that he has read the foregoing statement of claim and knows the contents thereof, and that he has signed the name of said organization to said statement, that the answers set forth therein are true to his best knowledge and belief.

Subscribed and sworn to before me this 12 day of June, 1950

My Commission expires: July 11-1955

Delbert Tidwell X
POK Anderson
NOTARY PUBLIC

Tab E

U.C.A. 1953 § **73-5-13**

UTAH CODE, 1953
TITLE 73. WATER AND IRRIGATION

CHAPTER 5. ADMINISTRATION AND DISTRIBUTION

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73-5-13 Notice of claim to surface or underground water not otherwise represented -- Filing -- Form -- Information and proof required -- Corrections -- Prima facie evidence of rights.

All claimants to the right to the use of water, including both surface and underground, whose rights are not represented by certificates of appropriation issued by the state engineer, by applications filed with the state engineer, by court decrees or by notice of claim heretofore filed pursuant to law, shall file notice of such claim or claims with the state engineer on forms furnished by him setting forth such information and accompanied by such proof as the state engineer may require, including but not limited to the following:

The name and post-office address of the person making the claim; the quantity of water claimed in acre-feet; and/or the rate of flow in second feet; the source of supply; the priority of the right, the location of the point of diversion with reference to a United States land survey corner, the place, nature, and extent of use, the time during which the water has been used each year and the date when the water was first used. A notice of claim may be corrected by filing with the state engineer a corrected notice designated as such and bearing the same number as the original claim. No fees shall be charged for filing a corrected notice of claim.

Such notices of claim, or claims, as provided in this section, shall be prima facie evidence of claimed right or rights therein described.

History: C. 1943, 100-5-15, added by L. 1949, ch. 97, § 3; 1955, ch. 160, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

COLLATERAL REFERENCES

Journal of Energy Law and Policy. -- A Primer of Utah Water Law, 5 J. Energy L. & Pol'y 165 (1984).

U.C.A. 1953 § **73-5-13**

UT ST § **73-5-13**

END OF DOCUMENT

Tab F

J. Craig Smith (4143)
David B. Hartvigsen (5390)
Brian C. Cheney (8881)
NIELSEN & SENIOR
60 East South Temple, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 532-1900

Attorneys for Green River Canal Company

**IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR
CARBON COUNTY, STATE OF UTAH**

IN THE MATTER OF THE GENERAL DETERMINATION
OF RIGHTS TO THE USE OF WATER, BOTH SURFACE
AND UNDERGROUND, WITHIN THE DRAINAGE AREA
OF THE GREEN RIVER FROM THE CONFLUENCE OF
THE PRICE AND GREEN RIVERS TO THE CONFLUENCE
OF THE GREEN AND COLORADO RIVERS EXCLUDING
THE DRAINAGE AREA OF THE SAN RAFAEL RIVER IN
UTAH

AFFIDAVIT OF JACK A. BARNETT

Code Nos. 91 and 92

Civil No. 8598

STATE OF UTAH)
 : ss.
COUNTY OF EMERY)

JACK BARNETT, being duly sworn, deposes and says:

1. I am the President of Barnett Intermountain Water Consulting, a water rights and water resources firm, which I founded in 1981. For a period in my career I was employed as an area engineer in the Office of the State Engineer for Utah. I am also a Professional Engineer, and a Professional Geologist, duly licensed in the state of Idaho.

2. I have been retained by the Green River Canal Company as a consultant and expert witness in another action brought by the Canal Company. In connection with those services, I have inspected the Canal Company's diversion works and canal system on several different occasions in

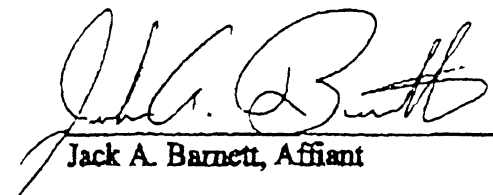
the last few years. I have observed its operation and discussed the same with many of its officers, directors, and shareholders.

3. On May 5, 1999, I had the flows in the Canal Company's raceway and canal measured. The flows in the raceway were measured at 853 cfs and the flows in the canal were measured at 79.4 cfs. The remaining flows in the raceway, which amounted to 773.6 cfs, were being diverted to Mr. Lee Thayn.

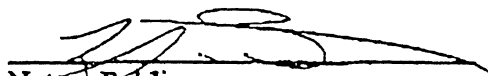
4. It is my opinion that it is currently necessary, and has been necessary for as long as the canal system has been in its present configuration, for the canal to have approximately 80 cubic feet per second of water flowing in it during the irrigation season in order for the canal system to function properly.

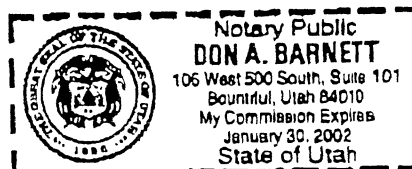
5. The Green River is extremely silt laden and the silt settles out rapidly as the water moving through the raceway and canal slows down. Therefore, frequent sluicing is essential to the operation of the canal.

DATED this 1 day of December, 2000.


 Jack A. Barnett, Affiant

SUBSCRIBED AND SWORN TO before me on this 1st day of December, 2000.


 Notary Public



Tab G

IN THE SEVENTH JUDICIAL DISTRICT COURT, IN AND FOR THE
COUNTY OF CARBON STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION
OF RIGHTS TO THE USE OF WATER, BOTH SURFACE AND
UNDERGROUND, WITHIN THE DRAINAGE AREA OF THE PRICE
RIVER AND OF THE DRAINAGE AREA OF THE GREEN RIVER
FROM THE CONFLUENCE OF THE PRICE AND GREEN RIVERS
TO THE CONFLUENCE OF THE GREEN AND COLORADO RIVERS
INCLUDING THE DRAINAGE AREA OF THE SAN RAFAEL RIVER
UTAH

STATEMENT OF WATER
USER'S CLAIM
CODE NO SERIAL NO
91 294
MAP NO 144d

NOTE: This blank is sent to you in accordance with Utah Law. The information called for herein will be used in connection with the adjudication of water rights on the above mentioned drainage area. All questions applicable to your claim must be answered fully and one copy of this form must be filed with the Clerk of the District Court at

Price Utah, within sixty (60) days from date of service of the attached Notice. A copy shall be filed with the State Engineer, State Capitol, Salt Lake City. Failure to file the attached Statement of the Water User's claim with the Clerk of the District Court within the time stated will forever bar and estop you from asserting any right to the use of water from said drainage area.

Name of Claimant **Green River Canal Company**

Interest Claimed **Full**

Address **Green River, Utah 84525**

Name of particular spring, spring area, stream, well, tunnel or drain from which water is diverted is
Green River (Gravity Canal) in **Emery** County

Priority date claimed **1880** Date when water was first used

Date when work on diverting system was first begun Date when diverting system was completed

Nature of work

Class of Right (Indicate by X)

(a) ☒ Right to surface water initiated by beneficial use before 1903 Claim No **40**

(b) Right to underground water initiated before 1935 Claim No

(c) Right decreed by court, cite title of case

(d) Application filed, State Engineer's Office No

Cert of App No

(e) Right acquired by adverse use prior to 1939

Nature (Indicate by X) Amount and Annual Period of Use (by month & day)

a) ☒ Irrigation Sec Ft **60 cfs** from **March 15** to **November 1** (both dates incl)

b) ☒ Stockwatering Sec Ft **20** from **January 1** to **December 31** (both dates incl)

c) ☒ Domestic Sec Ft **Inc.** from **January 1** to **December 31** (both dates incl)

d) Municipal Sec Ft from to (both dates incl)

e) Sec Ft from to (both dates incl)

Direct Flow Appropriation (must be described with reference to U S Government Survey Corner)

f) Point of diversion from spring, spring area, stream, well, tunnel, drain **N. 1950 ft. and W. 800 ft. from the SE Cor., Sec. 17, T20S, R16E, SLB&M.**

g) Description of spring area

h) Point of diversion or point of return to natural channel

i) If flow is intermittently diverted list by number or description, all rights involved

Where water is used for irrigation purposes

Area irrigated in legal subdivisions of land by 40-acre tract (All sources of water for same land or lands must be described in each instance by name or claim number) **CLAIMS USED FOR PURPOSE DESCRIBED.**

294

Do you get water under a ditch owned by several users
Names of interest

If so, give names of all users and

How water is used for Stockwatering

2,000 Cattle, 3,000 Sheep, 100 Horses

Number of each kind of stock watered

All sources of water for same stock (Describe by name or claim number)

How water is used for Domestic

75 Families

Number of families or their equivalent
Describe by name or claim number)

All sources of water for same use

11 Where water is used for Municipal Purposes

(a) Name of city or town supplied

Number of families

Population

Quantity of water

12 Where water is used for a purpose not above enumerated

(a) Nature of Use

Extent of Use

13 Appropriation for Storage Purposes

(a) Name of reservoir

(b) Location of reservoir by legal subdivisions described by 40 acre tracts

(c) Maximum capacity of reservoir in acre feet

Year construction commenced

Completed

Water first used

Is reservoir located on or off stream

(d) Period of Storage from

to

(both dates incl) Period of use from

to

(both dates incl) Maximum area in acres inundated

Max depth in feet

Average depth in feet

Is reservoir drained each year

Maximum number of fillings per

year

Is reservoir used for equalizing purposes

If feeder canal is used, give maximum

carrying capacity in sec ft

14 Diverting Works

(a) Surface water diverting dam Material composed of

Max length

Max height

Max. width at bottom

Max width

at top

(b) Underground water diverting works Is well flowing or pump

Depth of well

Diameter of well

Length of drain

Width of drain

Depth of drain

Diameter of drain

Length of tunnel

Width of tunnel

Height of tunnel

Type of pump

Capacity of pump

(c) Surface and underground water conveying works Length of ditch to first place of use

Width of

ditch at top

Width of ditch at bottom

Depth of water

Grade of

ditch per 1000 ft

Material through which ditch passes

Maximum length of

pipe line to first place of use

Diameter of pipe line

Grade of pipe line per

1000 feet

15 The undersigned hereby enters his appearance and waives service of summons or other process

STATE OF UTAH

COUNTY OF

SS (To be used if claimant is an individual)

being first duly sworn, upon oath deposes and says that he is the claimant whose name appears hereon, that he has read the foregoing statement of his claim and knows the contents thereof, that he has signed the same, and that the answers set forth therein are true to his best knowledge and belief

Signature of Claimant

Subscribed and sworn to before me this

day of

19

NOTARY PUBLIC

STATE OF UTAH

COUNTY OF Emery

John Vetere, Jr.

President

SS (To be used if claimant is a corporation or an estate)

being first duly sworn, upon oath deposes and says that he is the of the above claimant, that he makes this certification on behalf of said claimant, that he has read the foregoing statement of claim and knows the contents thereof and that he has signed the name of said claimant to said statement that the answers set forth therein are true to his best knowledge and belief

Green River Canal Company

Subscribed and sworn to before me this

6th

day of

November

19 69

By: John Vetere, Jr. President

NOTARY PUBLIC

9.20 acs. in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 1.7 acs. in NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 20; 7.70 acs. in NE $\frac{1}{4}$ NE $\frac{1}{4}$, 9.00 acs. in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 6.60 acs. in SW $\frac{1}{4}$ SE $\frac{1}{4}$, 0.20 ac. in NE $\frac{1}{4}$ SE $\frac{1}{4}$, 24.30 acs. in NW $\frac{1}{4}$ SE $\frac{1}{4}$, 0.70 ac. in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 22.40 acs. in SW $\frac{1}{4}$ SE $\frac{1}{4}$, 23.30 acs. in SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 29; 23.00 acs. in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 28.40 acs. in NE $\frac{1}{4}$ SE $\frac{1}{4}$, 1.10 acs. in SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 31; 4.7 acs. in NW $\frac{1}{4}$ NE $\frac{1}{4}$, 36.00 acs. in NE $\frac{1}{4}$ NW $\frac{1}{4}$, 9.30 acs. in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 17.70 acs. in SE $\frac{1}{4}$ NW $\frac{1}{4}$, 35.70 acs. in SW $\frac{1}{4}$ NW $\frac{1}{4}$, 7.20 acs. in NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 32; all in T20S, R16E, SLB&M. 15.20 acs. Lot 1, 32.50 acs. Lot 2, 45.50 acs. in Lot 3, 8.50 acs. Lot 4, 4.60 acs. Lot 9, 28.70 acs. Lot 10, 11.8 acs. Lot 11, Sec. 3; 4.20 acs. Lot 16, 20.00 acs. Lot 20, 0.70 ac. NW $\frac{1}{4}$ SE $\frac{1}{4}$, 36.00 acs. in SE $\frac{1}{4}$ SE $\frac{1}{4}$, 31.80 acs. in SW $\frac{1}{4}$ SE $\frac{1}{4}$, 4.10 acs. in SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 4; 36.00 acs. in NE $\frac{1}{4}$ NE $\frac{1}{4}$, 33.80 acs. in NW $\frac{1}{4}$ NE $\frac{1}{4}$, 16.00 acs. in NE $\frac{1}{4}$ NW $\frac{1}{4}$, 37.70 acs. in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 37.50 acs. in SW $\frac{1}{4}$ NE $\frac{1}{4}$, 1.10 acs. in SE $\frac{1}{4}$ NW $\frac{1}{4}$, 9.70 acs. in NE $\frac{1}{4}$ SE $\frac{1}{4}$, 33.50 acs. in NW $\frac{1}{4}$ SE $\frac{1}{4}$, 1.70 acs. in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 2.80 acs. in SE $\frac{1}{4}$ SE $\frac{1}{4}$, 27.80 acs. in SW $\frac{1}{4}$ SE $\frac{1}{4}$, 9.20 acs. in SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 9; 20.00 acs. in NW $\frac{1}{4}$ NE $\frac{1}{4}$, 31.60 acs. in NE $\frac{1}{4}$ NW $\frac{1}{4}$, 39.00 acs. in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 33.20 acs. in SW $\frac{1}{4}$ NE $\frac{1}{4}$, 38.00 acs. in SE $\frac{1}{4}$ NW $\frac{1}{4}$, 36.20 acs. in SW $\frac{1}{4}$ NW $\frac{1}{4}$, 22.70 acs. in NW $\frac{1}{4}$ SE $\frac{1}{4}$, 40.00 acs. in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 38.70 acs. in NW $\frac{1}{4}$ SW $\frac{1}{4}$, 5.40 acs. in SW $\frac{1}{4}$ SE $\frac{1}{4}$, 34.30 acs. in SE $\frac{1}{4}$ SW $\frac{1}{4}$, 25.70 acs. in SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 10; 20.70 acs. in NE $\frac{1}{4}$ NW $\frac{1}{4}$, 37.60 acs. in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 0.40 ac. in SE $\frac{1}{4}$ NW $\frac{1}{4}$, 5.70 acs. in SW $\frac{1}{4}$ NW $\frac{1}{4}$, 8.50 acs. in NW $\frac{1}{4}$ SW $\frac{1}{4}$, 5.20 acs. in SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 15; 13.90 acs. in NE $\frac{1}{4}$ NE $\frac{1}{4}$, 29.50 acs. in NW $\frac{1}{4}$ NE $\frac{1}{4}$, 4.40 acs. in NE $\frac{1}{4}$ NW $\frac{1}{4}$, 29.40 acs. in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 16.20 acs. in SW $\frac{1}{4}$ NE $\frac{1}{4}$, 22.50 acs. in NE $\frac{1}{4}$ SE $\frac{1}{4}$, 28.50 acs. in NW $\frac{1}{4}$ SE $\frac{1}{4}$, 2.00 acs. in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 35.50 acs. in SE $\frac{1}{4}$ SE $\frac{1}{4}$, 26.20 acs. in SW $\frac{1}{4}$ SE $\frac{1}{4}$, 0.20 acs. in SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 16; 23.00 acs. in NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 21, 3.50 acs. in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 1.40 acs. in SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, all in T21S, R16E, SLB&M. Total of 1,443.30 acres.

Tab H

DEC 05 2003

SMITH HARTVIGSEN

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF UTAH IN AND FOR CARBON COUNTY

**FIRST ADDENDUM TO THE PROPOSED DETERMINATION OF WATER RIGHTS
PRICE RIVER AND LOWER GREEN RIVER DRAINAGE**

IN THE MATTER OF THE GENERAL DETERMINATION
OF THE RIGHTS TO USE OF WATER, BOTH SURFACE
AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF THE
THE PRICE RIVER AND OF THE DRAINAGE AREA OF THE GREEN RIVER FROM THE
CONFLUENCE OF THE PRICE AND GREEN RIVERS TO THE CONFLUENCE OF THE
GREEN AND COLORADO RIVERS EXCLUDING THE DRAINAGE AREA OF THE
SAN RAFAEL RIVER IN UTAH

AREA 91
ALL BOOKS

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT,
IN AND FOR CARBON COUNTY, STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHTS TO USE OF
WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF
THE PRICE RIVER AND OF THE DRAINAGE AREA OF THE GREEN RIVER FROM THE CONFLUENCE OF
THE PRICE AND GREEN RIVERS TO THE CONFLUENCE OF THE GREEN AND COLORADO RIVERS EXCLUDING
THE DRAINAGE AREA OF THE SAN RAFAEL RIVER IN UTAH

PRICE RIVER DRAINAGE (AREA 91-ALL)

Civil No 690708598 (91-All)

NOTICE TO WATER USERS WITHIN THE ABOVE-DESCRIBED DRAINAGE AREA

This is your copy of the First Addendum to the Proposed Determination of Water Rights in Area 91, All Books, of the Price River Drainage. The Proposed Determination, as modified by this First Addendum, is the State Engineer's report and recommendation to the Court. A copy of the Proposed Determination (as contained in several published books) and this Addendum will be on file with the Clerk of the Seventh District Court in Price, Utah. Additional copies may be obtained from the Division of Water Rights at 1594 West North Temple, Suite 220, Salt Lake City, UT 84116, by paying the cost of printing.

You are hereby notified that under Section 73-4-11, Utah Code Annotated (1989), any claimant dissatisfied with the First Addendum to the Proposed Determination may object, but only as follows: The claimant must file with the Clerk of the Seventh District Court in Price, a written objection duly verified on oath. The objection must be filed within ninety (90) days after the claimant is served with the First Addendum to the Proposed Determination, and must reference Civil No 690708598 (91-All). The date of service is either the date the First Addendum was mailed to the claimant's address of record at the Office of the State Engineer, or the date the claimant picked up a copy of the First Addendum in person (in lieu of mailing). If a claimant receives copies by mail and in person, the earlier date of service begins the ninety day objection period. A copy of the objection should also be sent to the Division of Water Rights at the mailing address shown below. The objection may address only the irrigation duty as described in this First Addendum. Objections may not address issues that could have been raised as to the unmodified Proposed Determination.

L. Ward Wagstaff
Julie I. Valdes
Assistant Attorneys General
Attorneys for the State Engineer

Jerry D. Olds, P.E.
State Engineer
DIVISION OF WATER RIGHTS
Price River Adjudication
P.O. Box 146300
Salt Lake City, UT 84114-6300

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT,
IN AND FOR CARBON COUNTY, STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION
OF THE RIGHTS TO USE OF WATER, BOTH SURFACE
AND UNDERGROUND, WITHIN THE DRAINAGE AREA
OF THE PRICE RIVER AND OF THE DRAINAGE AREA OF
THE GREEN RIVER FROM THE CONFLUENCE OF THE
PRICE AND GREEN RIVERS TO THE CONFLUENCE OF
THE GREEN AND COLORADO RIVERS EXCLUDING THE
DRAINAGE AREA OF THE SAN RAFAEL RIVER IN UTAH

PROPOSED DETERMINATION OF WATER RIGHTS
IN THE PRICE RIVER AND LOWER GREEN RIVER
DRAINAGE

AREA 91, ALL BOOKS

Civil No. 690708598 (91-ALL)

Jerry D. Olds, State Engineer of the State of Utah,
respectfully submits this report to the Court.

1. Geographical Area Covered This General Adjudication includes all water sources, both surface and underground, within the Drainage Area of the Price River and the drainage area of the Green River from the confluence of the Price and Green Rivers to the confluence of the Green and Colorado Rivers excluding the drainage area of the San Rafael River in Utah. This Proposed Determination covers only those water rights in the Price River Drainage (Area 91) of the General Adjudication. Area 91 is shown on the index map immediately hereinafter.

2. Duty of Irrigation Water. In response to certain objections to the Proposed Determinations regarding duty, the State Engineer has re-evaluated the duty in Area 91. The maps published herein present the boundaries and newly determined duties for Area 91. More detailed maps are available for review in the Price and Salt Lake City offices of the State Engineer. The calculation of duty contemplates many factors, including evapotranspiration, average precipitation, and application and conveyance losses.

Because a water right is limited by the extent of its beneficial use, an irrigation right is limited by the acreage actually irrigated. The amount of water which may be diverted to irrigate the crops to maturity in a specific area is known as

the duty. The duty per calendar year is measured at the point of diversion from the natural water source. The duty shown is based on efficiencies associated with flood irrigation practices. As irrigation practices change to improve irrigation efficiency, it is anticipated less water will be diverted.

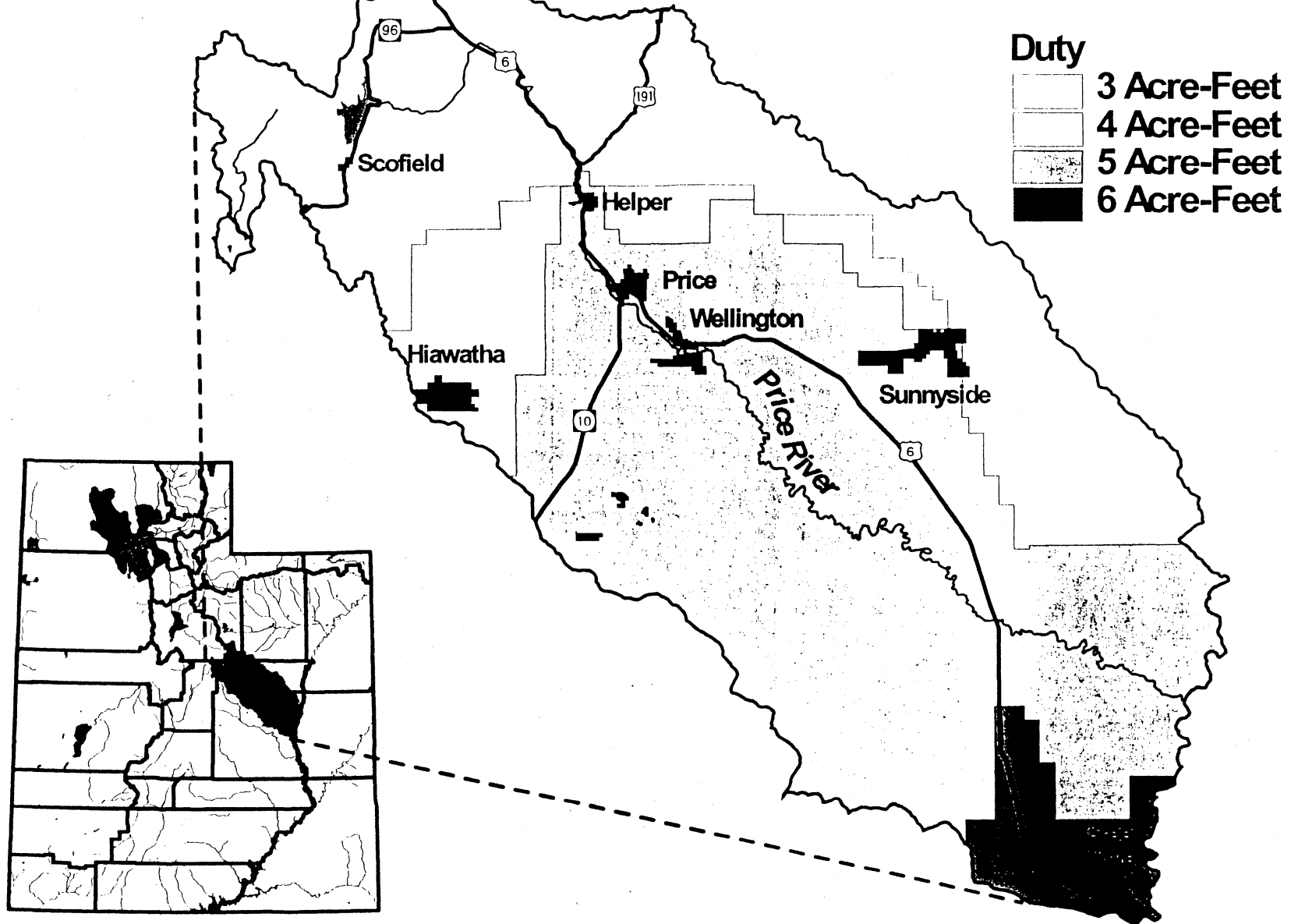
The State Engineer has determined that in the Price River drainage area, the application each year of more than the individually or generally established duty of water per acre is unnecessary and would not be a beneficial use of the excess water.

3. This Proposed Determination of Water Rights was approved for publication on the 4th day of APRIL, 2003.

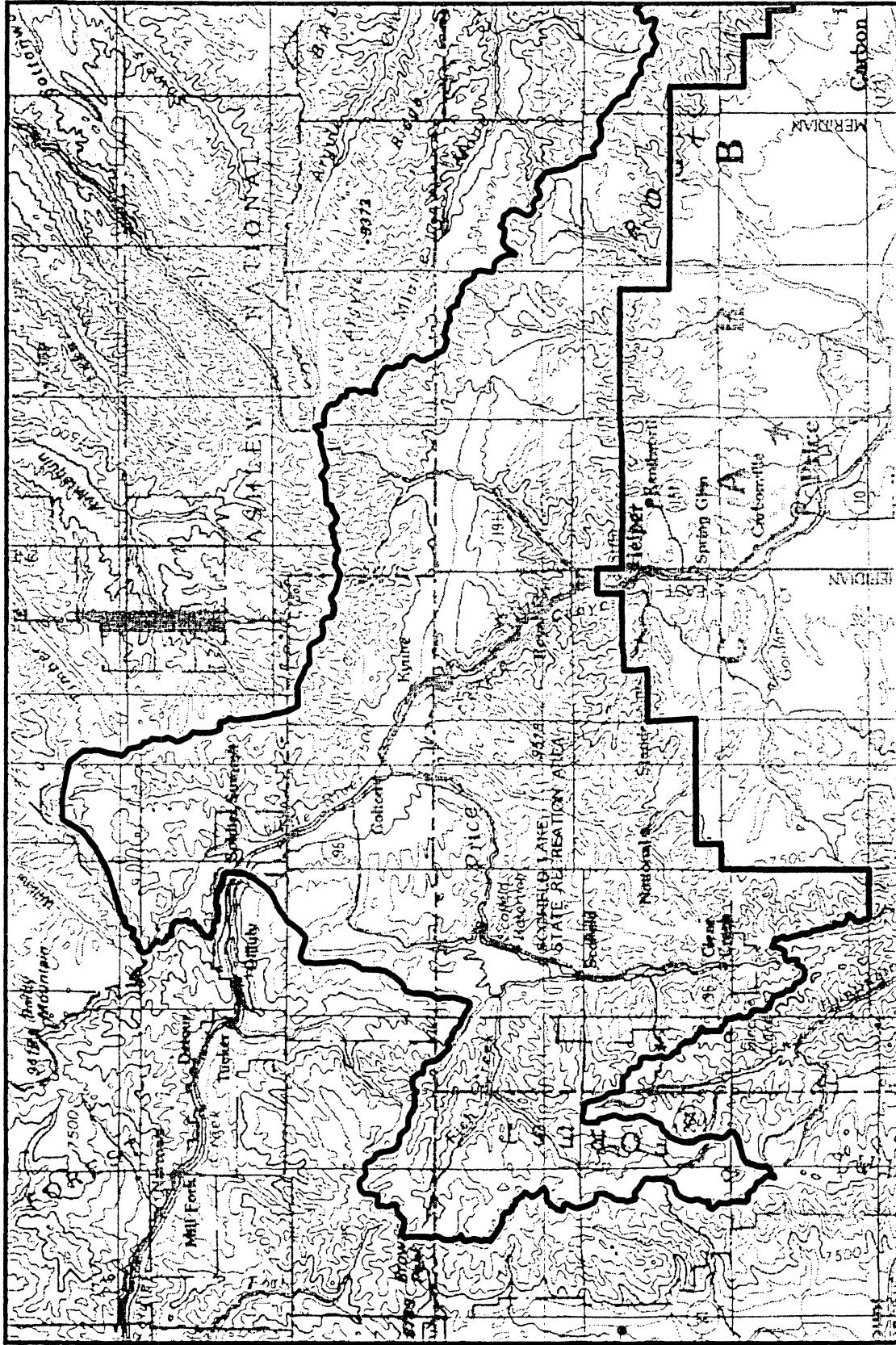
Jerry D Olds
JERRY D. OLDS, P.E.
State Engineer

Location Map

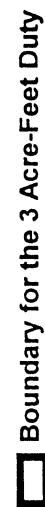
Water Right Area 91



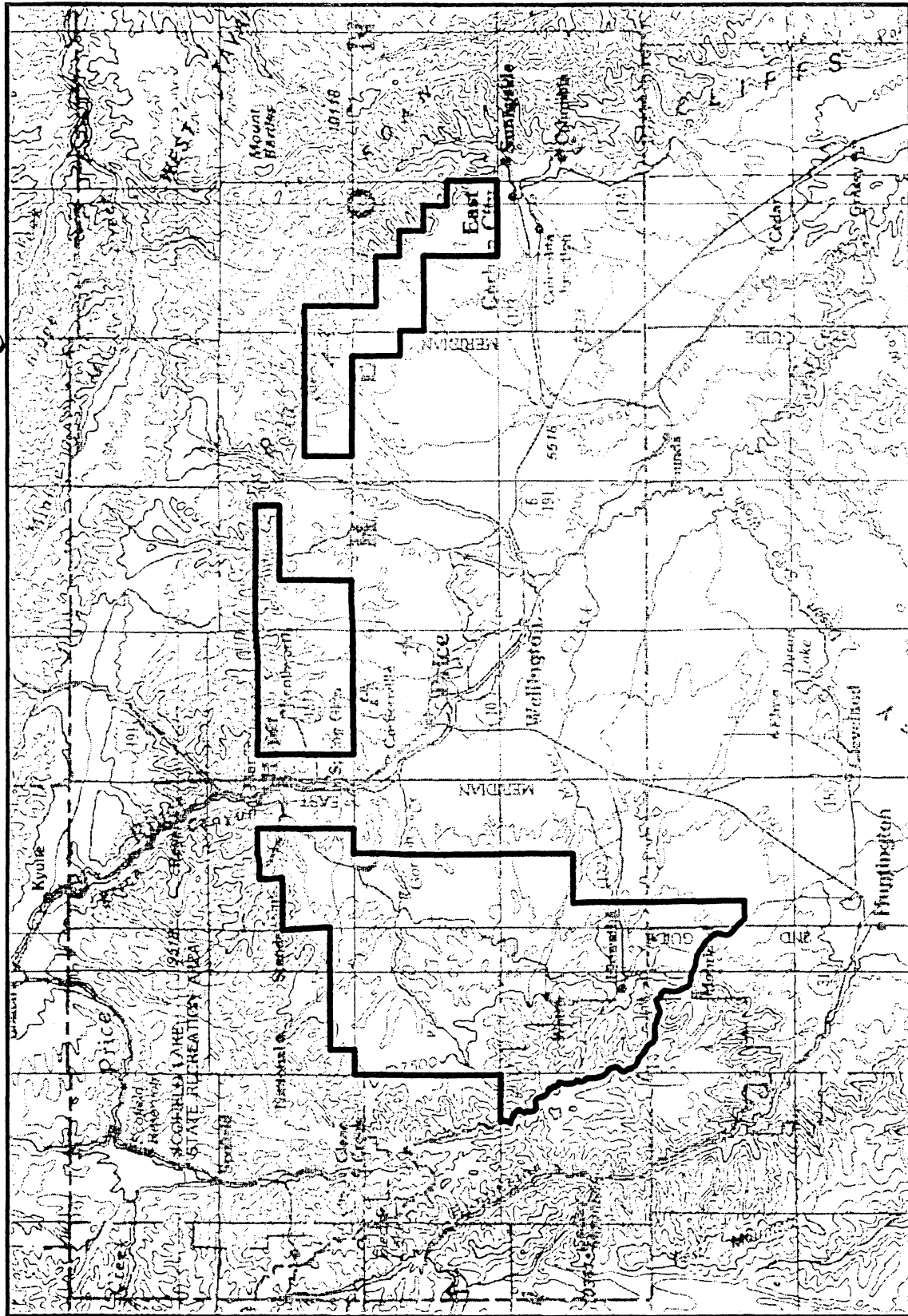
3 Acre-Feet Duty



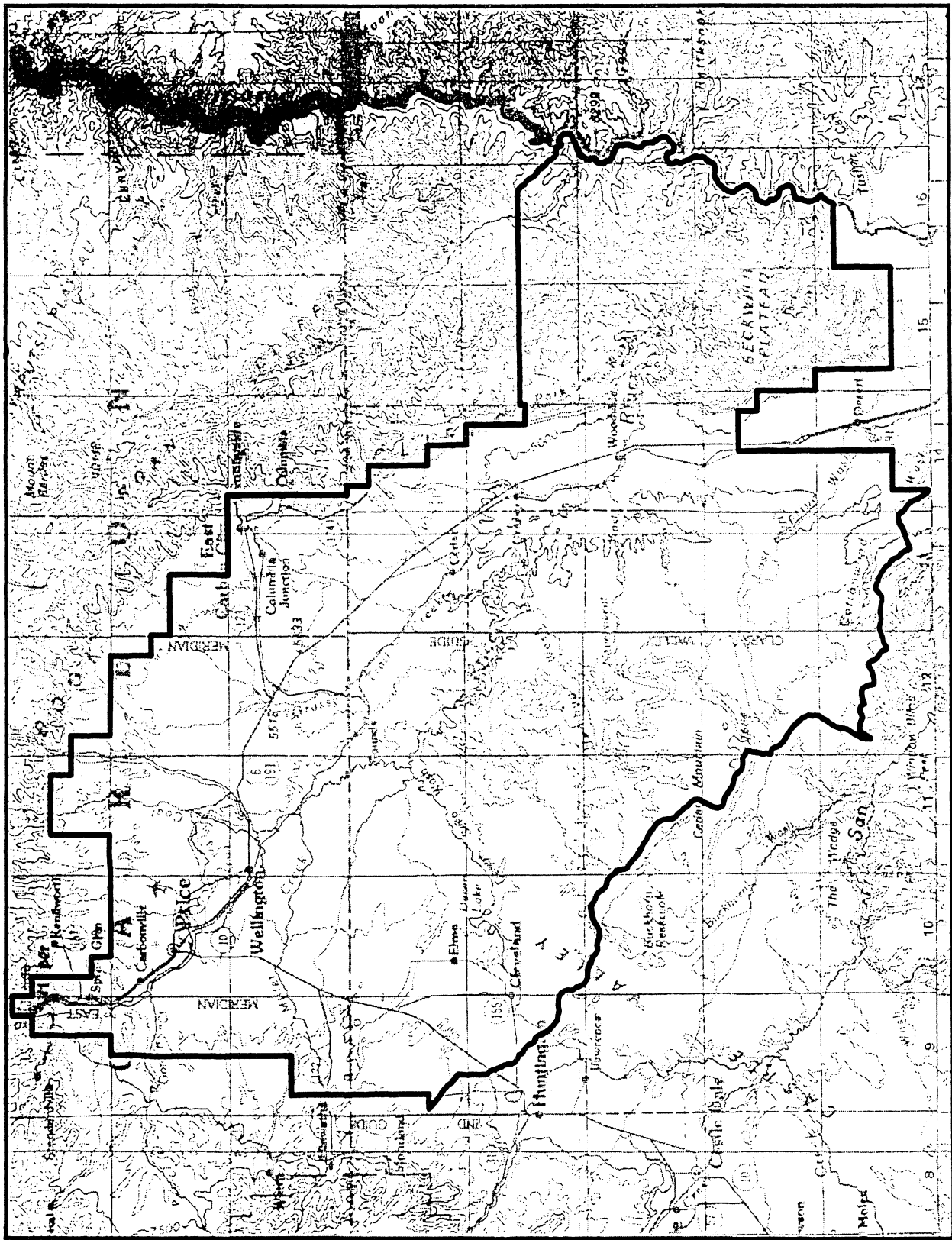
This topographic map depicts the Carbonate Mountains region in Colorado. A prominent boundary line separates the National Forest (to the north) from the Carbonate National Monument (to the south). Key locations labeled include Wellington, Carbonate, and the Carbonate Mountains. The Colorado River is shown flowing through the area, and the Grand Canyon is visible in the upper right. The map includes a grid system and various geographical features such as ridges, valleys, and smaller settlements like Elmo and Dancer.




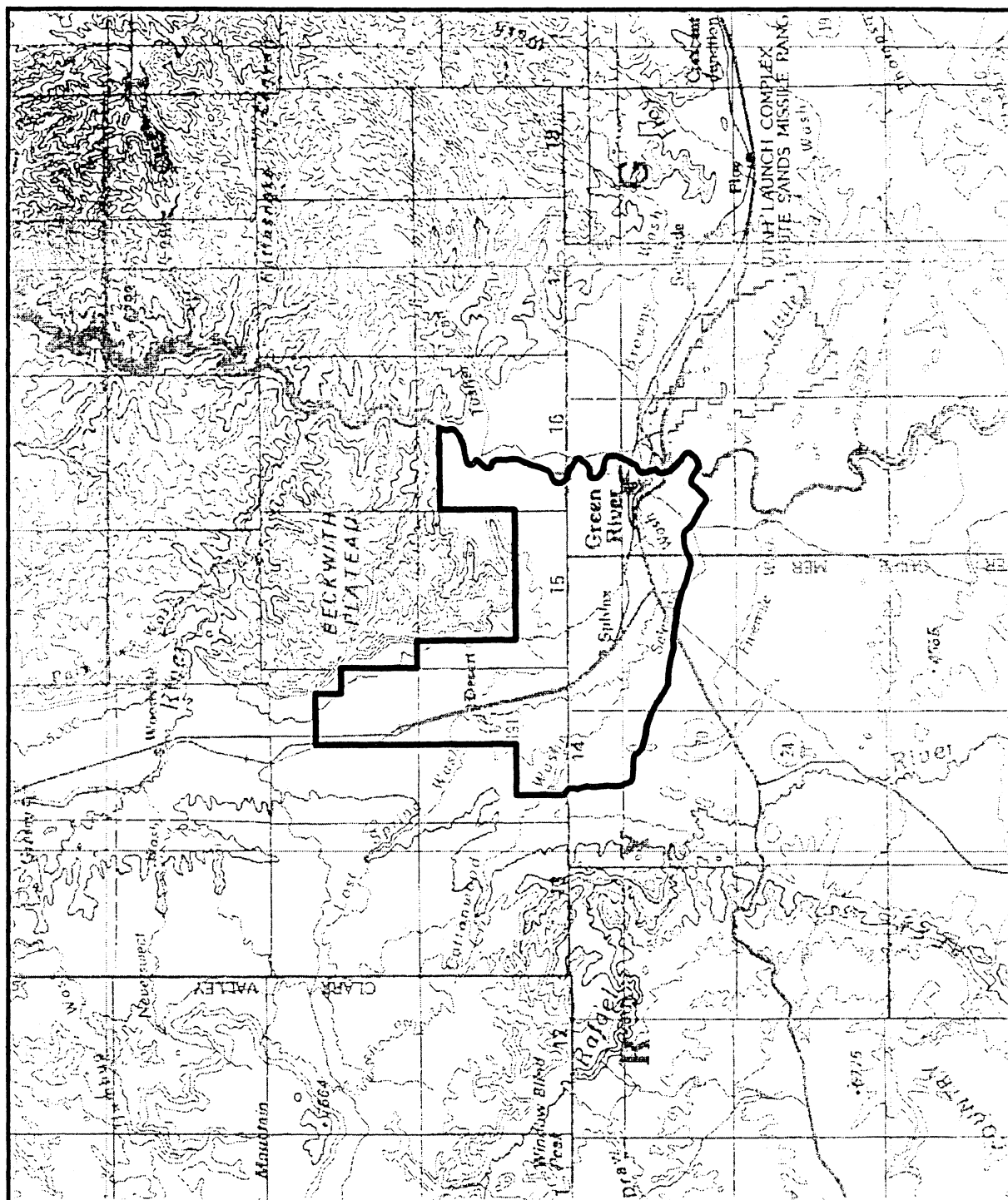
4 Acre-Feet Duty



□ Boundary for the 4 Acre-Feet Duty



 Boundary for the 5 Acre-Feet Duty



Boundary for the 6 Acre-Feet Duty

Tab I

J. Craig Smith (4143)
David B. Hartvigsen (5390)
Brian C. Cheney (8881)
NIELSEN & SENIOR
60 East South Temple, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 532-1900

Attorneys for Green River Canal Company

**IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR
CARBON COUNTY, STATE OF UTAH**

IN THE MATTER OF THE GENERAL DETERMINATION
OF RIGHTS TO THE USE OF WATER, BOTH SURFACE
AND UNDERGROUND, WITHIN THE DRAINAGE AREA
OF THE GREEN RIVER FROM THE CONFLUENCE OF
THE PRICE AND GREEN RIVERS TO THE CONFLUENCE
OF THE GREEN AND COLORADO RIVERS EXCLUDING
THE DRAINAGE AREA OF THE SAN RAFAEL RIVER IN
UTAH

**AFFIDAVIT OF HAROLD D.
DONALDSON**

Code Nos. 91 and 92

Civil No. 8598

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

HAROLD D. DONALDSON, being duly sworn, deposes and says:

1. I was employed by the State of Utah in the Utah State Water Engineer's office, also known as the Division of Water Rights, from approximately 1952 to 1988. During the period of time from 1956 to 1988, I was in charge of overseeing various general adjudication proceedings including the above-captioned general adjudication and was designated as the Directing Engineer over Adjudications in that office.

2. I was personally involved in preparing the proposed determinations of water rights in the various general adjudication proceedings.

3. I was also personally involved in distributing the proposed determination books to the various water claimants.

4. After the proposed determination was distributed to the water claimants, I was also personally involved in investigating and responding to any objections to the proposed determination by the water claimants.

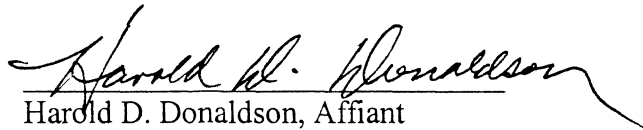
5. It was the policy of the State Engineer's office to investigate and answer each protest to the proposed determination and submit the answer thereto to the Attorney General's office, regardless of when it was filed. In numerous cases, the Attorney General's office did not act pursuant to our answer or recommendation but rather were unable to proceed due to lack of manpower.

6. During my involvement in this and other General Adjudications, because the Attorney General's office was unable to prosecute the General Adjudications due to its heavy involvement in other litigation, objections filed after the expiration of the ninety day periods were accepted. If the State Engineer's office did not agree with the Objection, then the Objection was litigated on its merits even if untimely. The State Engineer's office sought to determine the water rights on their merits in order to make the final determination as accurate and correct as possible.

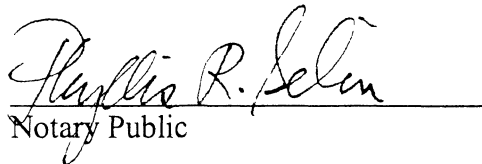
7. I have reviewed the objections of the Green River Canal Company in the above captioned general adjudication and, in my opinion, the objections have merit due to the unique circumstances of the high silt load in the Canal and the Green River and thus additional water is used for the system to properly function in the way it has been historically, and the Objection should be

incorporated into the proposed determination by way of addendum, or should their merits be opposed, be heard by and decided by this Court on its merits.

DATED this 1st day of December, 2000.


Harold D. Donaldson, Affiant

SUBSCRIBED AND SWORN TO before me on this 1st day of December, 2000.


Notary Public